Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

91-1617

No.

IN THE

United States Supreme Court

October Term, 1991

WILLIAM C. HULS AND
MARSDEN W. MILLER, JR.,
Petitioners

VERSUS

UNITED STATES OF AMERICA,
Respondent

**Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit**

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April 10, 1992

QUESTIONS PRESENTED

1. Does a criminal defendant forever lose his right to double jeopardy protection based upon insufficient evidence at his initial trial if his conviction is reversed on other grounds?

The Fifth Circuit acknowledged that prior case law "directly supports the defendants' double jeopardy arguments," and that a rule permitting retrial under these facts might lead to "unconscionable" results. Nevertheless, the Fifth Circuit concluded that *Richardson v. United States*, 468 U.S. 317 (1984), mandated rejection of defendants' double jeopardy claims and "respectfully decline[d] to follow" decisions from other circuits holding that *Richardson* has no bearing at all in a case such as this.

2. When a defendant's conviction is reversed on appeal, may he be reprosecuted for the same conduct on a theory of criminal liability that was abandoned by the government for strategic reasons at the first trial?

Other circuit courts and several district courts have held that the double jeopardy clause bars retrial on an abandoned theory, but the Fifth Circuit here adopted a contrary view.

LIST OF PARTIES

The parties to the proceedings below were petitioners William C. Huls and Marsden W. Miller, Jr., and respondent, the United States of America.

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Petitioners William C. Huls and Marsden W. Miller, Jr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion, Appendix ("App.") 1a, is reported at 952 F.2d 866. The opinion of the district court, App. 17a, is unreported.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals is dated January 23, 1992. Defendants' timely petitions for rehearing and suggestions for rehearing en banc were denied on February 24, 1992. This Court has jurisdiction under 28 U.S.C. § 1254. This petition is timely under this Court's Rule 13.4, because this petition is being filed within 90 days after the denial of defendants' petition for rehearing.

APPLICABLE CONSTITUTIONAL PROVISION

U.S. Constitution, Amendment 5:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

Petitioners William Huls and Marsden Miller were founders, officers and shareholders of The Exploration Company of Louisiana, Inc. ("XCL"). In 1984, Mr. Huls left XCL to become Secretary of the Louisiana Department of Natural Resources. As secretary, Mr. Huls served as an ex-officio member of the state's Mineral Board, which, pursuant to a public bid process, reviewed sealed bids and awarded mineral leases to private companies bidding to explore state-owned land for gas and oil.

In 1986, Mr. Huls and Mr. Miller were indicted for mail fraud. The indictment alleged that Mr. Huls maintained substantial connections to XCL while serving as secretary, and that Mr. Huls and Mr. Miller conspired to hide these connections from the Mineral Board and the Louisiana Ethics Commission.[1] Due to the alleged XCL connections, Mr. Huls purportedly was obliged to recuse himself from participation in Mineral Board consideration of transactions involving XCL. The indictment went on to assert that, despite the recusal requirement arising from the undisclosed XCL connections, Mr. Huls participated in the Board's decision to grant certain mineral leases to XCL.[2]

During the three-week trial, the government focused its case on the theory that the defendants' alleged conduct constituted

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[1] Mr. Huls' alleged XCL connections were: (1) stock ownership (Mr. Huls had sold his XCL stock to Mr. Miller, but the government alleged the sale was a "sham"); (2) mineral interests in wells drilled by XCL; (3) the continuation of Mr. Huls on XCL's health insurance policy; (4) a Mercedes Benz automobile, which XCL gave Mr. Huls in lieu of his retirement pension; (5) some chartered airline flights, which XCL provided to Mr. Huls free of charge; and (6) Mr. Huls' pre-existing conditional obligations on certain XCL-related liabilities. Defendants asserted, and the jury found, that the stock sale was not a sham. *United States v. Huls*, 841 F.2d 109, 110 (5th Cir. 1988)

[2] The government has *only* alleged that Mr. Huls' XCL connections should have been disclosed; there has never been any suggestion that the alleged connections were improper *per se*. There have never been any allegations of bribery, kickbacks, or any similar financial impropriety. Nor has the prosecution ever suggested that the subject leases were unfair to the state, or that the defendants' conduct prevented the state from getting potentially better bids for the leases.

mail fraud because it was intended to defraud the citizens of Louisiana of their intangible right to a government "administered honestly, fairly, impartially, . . . and with all information which is material to [its] business." At the conclusion of the evidence, the government only requested jury instructions on this so-called "good government" theory of mail fraud; the prosecution did not seek, even in the alternative, jury instructions on any theory that the defendants had schemed to deprive anyone of money or property rights.[3]

By characterizing the defendants' conduct as a scheme to deprive the state of "good government," the prosecution obtained important strategic advantages. Most significantly, the government was able to persuade the trial judge to grant a broad motion *in limine* that drastically limited the defendants' evidence and the presentation of their defense. App. 6a. For example, on the basis that the defendants were accused of defrauding the state of "good government" and not money or property, the order *in limine* excluded evidence that no one else bid on these mineral leases, that the leases were awarded on their merits and were highly beneficial to the state, and that they produced substantial income to the state and large losses to the lessee.

After lengthy jury deliberation and two *Allen* charges, Mr. Miller was acquitted of twelve of the fifteen counts and convicted on the other three. Mr. Huls was acquitted on eleven counts and convicted on four.

On appeal, defendants contended that the evidence was insufficient to support their convictions, and they also complained of defects in the indictment, the jury instructions, and some evidentiary rulings. While the appeal was pending, this Court rendered its decision in *McNally v. United States*, 483 U.S. 350

[3] Although mail fraud traditionally required proof that the defendant acted with intent to deprive the victim of money or property, several lower courts had attempted to expand the scope of the mail fraud statute by adopting the good government theory, under which a public official could be convicted of mail fraud simply for depriving citizens of "their intangible rights to honest and impartial government." *McNally v. United States*, 483 U.S. 350, 355 (1987) (rejecting the good government theory).

(1987), which completely rejected the good government theory and held that the mail fraud statute reaches only fraudulent schemes intended to deprive the victim of money or property.[4] In light of *McNally*, the Fifth Circuit reversed the convictions of Mr. Huls and Mr. Miller, because the indictment and jury instructions did not require a finding of a money or property deprivation. *United States v. Huls*, 841 F.2d 109 (5th Cir. 1988). The Fifth Circuit declined to address the "other points" argued by defendants, including their contention that the trial evidence was insufficient for conviction. *Id.* at 112.

Both defendants were subsequently reindicted on similar mail fraud charges. The only significant difference was that the indictment now charged that the same alleged conduct was intended to deprive Louisiana of unspecified "property rights."

Defendants promptly moved in the district court for dismissal of the new indictment. Defendants urged two independent arguments in support of their contention that retrial was barred by the double jeopardy clause. First, defendants asserted that the double jeopardy clause barred retrial because the evidence at the initial trial was insufficient to support the convictions under any valid mail fraud theory.[5] Second, in the alternative, defendants argued that double jeopardy principles barred retrial because the government could have pursued a property theory of mail fraud at the initial trial yet chose to abandon this theory for strategic reasons.

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[4] *McNally* deemed the right of citizens to honest and impartial government to be "too ethereal" to fall within the protection of the mail fraud statute. *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

[5] The double jeopardy clause bars retrial if the evidence at the first trial was insufficient for conviction. *Burks v. United States*, 437 U.S. 1 (1978). The government has not seriously disputed that the evidence at the initial trial was in fact insufficient in light of *McNally*; the prosecution has merely contended that the evidentiary insufficiency is irrelevant because the convictions were reversed for trial error.

The district judge denied the double jeopardy motions. However, in rulings that are not now at issue, the court did dismiss substantial portions of the new indictment on grounds of prosecutorial vindictiveness and collateral estoppel. App. 17a-52a.

Defendants appealed the double jeopardy ruling to the Fifth Circuit. The appellate court agreed with defendants that, under the rationale of *United States v. Sneed*, 705 F.2d 745 (5th Cir. 1983), defendants are now entitled to a review of the sufficiency of the evidence. App. 7a. *Sneed* squarely holds that where, as here, an appellate court reverses a conviction without comment on an insufficient evidence claim, the defendant is entitled to adjudication of the insufficiency claim by the trial court, and by pre-trial appeal if the trial court decision is adverse, before the defendant may be retried. *Id.* at 746-49. This is because the double jeopardy clause forbids a second trial if acquittal "was the only proper verdict" in an earlier trial. *Id.* at 748, *quoting Tibbs v. Florida*, 457 U.S. 31, 41 (1982). Several other federal circuit courts have adopted the *Sneed* rule or a similar equivalent.[6]

While conceding that "*Sneed* directly supports the defendants' double jeopardy arguments," the court concluded that *Sneed* is "no longer good law" because of this Court's decision in *Richardson v. United States*, 468 U.S. 317 (1984). *Richardson* holds that an appellate court is not required to review the sufficiency of the evidence following a mistrial caused by a hung jury, because a mistrial does not "terminate jeopardy." *Id.* at 325. The Fifth Circuit felt that *Richardson* precluded an evidentiary review here, because a "reversal for instructional error is no more a termination of jeopardy than a mistrial where the jury is unable to agree." App. 8a-9a.

The court acknowledged that "other post-*Richardson* cases support the defendants' argument that they are entitled to a review of the sufficiency of the evidence at this time," but the

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[6] *See, e.g., United States v. Wood*, 950 F.2d 638 (10th Cir. 1991); *United States v. Anderson*, 896 F.2d 1076 (7th Cir. 1990); *Vogel v. Pennsylvania*, 790 F.2d 368 (3d Cir. 1986), and other cases discussed on pages 8-9 of this petition.

panel "respectfully decline[d] to follow" three of these cases and attempted to distinguish several others. App. 10a-12a. Also, the Fifth Circuit made no mention at all of the Tenth Circuit's very recent decision in *United States v. Wood*, 950 F.2d 638 (10th Cir. 1991), which specifically rejected the same *Richardson* argument.

The court concluded its analysis by conceding that it is "clearly the better practice" for the appellate court to adjudicate a properly presented insufficient evidence claim on the initial appeal. App. 12a. However, the manifest result of the holding is that if the appellate court on initial appeal fails to follow the "better practice" for *any* reason—including even oversight—the defendant's double jeopardy claim is forever lost, no matter how carefully he attempts to preserve the issue.

The Fifth Circuit also rejected defendants' alternative contention that retrial was barred due to the prosecution's abandonment of the property theory at the initial trial. The court did not address the Eighth Circuit's recent decision in *United States v. Cavanaugh*, 948 F.2d 405 (8th Cir. 1991), which squarely held, after a lengthy review of *Grady v. Corbin*, 110 S. Ct. 2084 (1990), and other pertinent Supreme Court authorities, that a defendant may not be retried on a theory of the alleged crime that was not presented to the original jury due to the government's deliberate trial strategy. In contrast, the Fifth Circuit brushed aside *Grady* in one conclusory sentence and held that retrial was permissible because the prosecution's tactics were "mere trial errors" that did not preclude a second trial. App. 6a.

The Fifth Circuit subsequently denied defendants' petitions for rehearing and suggestions for rehearing en banc, App. 53a, but the court did grant defendants' motion for a stay of the mandate pending this Court's ruling on this petition for certiorari. App. 55a. Mr. Miller and Mr. Huls now petition this Court to resolve the circuit conflict and to protect their constitutional double jeopardy rights by rejecting the Fifth Circuit's unfair holdings that will surely lead to unconscionable results.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE FOUR-WAY CIRCUIT SPLIT ON WHETHER, EVEN IF THE EVIDENCE WAS INSUFFICIENT AT HIS INITIAL TRIAL, A DEFENDANT FOREVER LOSES HIS RIGHT TO DOUBLE JEOPARDY PROTECTION IF HIS CONVICTION IS REVERSED ON OTHER GROUNDS

This Court should resolve the four-way split that now exists among the circuits on whether, and when, a criminal defendant is entitled to double jeopardy protection based on evidentiary insufficiency at his initial trial if his conviction is reversed on other grounds:

(1) The Fifth Circuit and the First Circuit hold that, if the first appellate court declines to reach the issue, the defendant may never thereafter complain of evidentiary insufficiency at the initial trial, based on the conclusion that *Richardson* mandates this result;

(2) The Third Circuit and the Tenth Circuit continue to adhere to the *Sneed* rule that, if the first appellate court does not decide the issue, the defendant is entitled to interlocutory review of the evidentiary sufficiency at the initial trial prior to any retrial, based on the conclusion that *Richardson* is limited to hung jury cases;

(3) The Seventh Circuit holds, as a matter of circuit policy, that a defendant is entitled to a review of the sufficiency of the evidence at the initial trial, even after he is convicted at a second trial, based on the conclusion that *Richardson* does not require but does permit such a review; and

(4) The Sixth Circuit and the Ninth Circuit hold that the sufficiency of the evidence *must* be adjudicated on the initial appeal, even if other grounds for reversal are present, thus avoiding the question whether *Richardson* precludes consideration of this issue on a subsequent appeal.

Under the First and Fifth Circuits' interpretation of *Richardson*,[7] a defendant with both an evidentiary insufficiency claim and procedural claims is faced with a Hobson's choice in appealing a conviction: he can present *only* the insufficiency claim to ensure that the appellate court will adjudicate it, so that retrial will definitely be barred by double jeopardy if the appeal is successful—but this approach would force him to waive meritorious procedural claims. Or he can raise *both* the insufficiency claim and the procedural claims and then hope and pray that the appellate court will follow the "better practice" and decide the insufficiency claim regardless of the disposition of the procedural claims—but under this approach the double jeopardy claim is lost forever where, as here, the initial appellate court for some reason, any reason, simply declines to consider the insufficiency issue. Petitioners submit this is contrary to basic notions of fair play and constitutional guarantees of due process and equal protection.

To assure fairness and to avoid such constitutional problems, most other circuits have rejected the government's contention that *Richardson* somehow precludes a review of the sufficiency of the evidence at the initial trial. The Fifth Circuit concedes its new rule is contrary to the view of the Third Circuit expressed in *Vogel v. Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986). App. 11a-12a. Two years after *Richardson*, *Vogel* cited *Sneed* in reaffirming the defendant's right to interlocutory review of the sufficiency issue prior to a second trial. Similarly, the Tenth Circuit has just held that, notwithstanding *Richardson*, interlocutory review will still be allowed after a trial that concludes with a verdict:

> *Richardson* involved an appeal following the declaration of a mistrial due to a hung jury. This scenario consistently has been held not to bar retrial.... *By contrast, the jury in the present case did reach a verdict*.... While the government may argue that the jury's verdict does not terminate jeopardy, at least three

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[7] In *United States v. Porter*, 807 F.2d 21 (1st Cir. 1986), the First Circuit adopted a view of *Richardson* similar to that of the Fifth Circuit in the present case.

> other circuits have permitted interlocutory appeals on double jeopardy claims subsequent to *Richardson* despite the absence of any event which would terminate the original jeopardy.

Wood, 950 F.2d at 642 (emphasis added).

The Seventh Circuit has taken the unique position that, even though under *Richardson* it is not *required* to conduct an evidentiary review, it will always grant such a review to criminal defendants as a matter of circuit policy. *United States v. Anderson*, 896 F.2d 1076, 1078 (7th Cir. 1990); *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir.), *cert denied*, 493 U.S. 841 (1989). In both *Anderson* and *Douglas*, the Seventh Circuit reviewed the sufficiency of the evidence at the first trial on appeal after a second conviction. In contrast, here the Fifth Circuit has explicitly held that defendants will not be entitled to a review of the evidence at the first trial, even on an appeal following a second conviction. App. 12a.[8]

In the Ninth Circuit and the Sixth Circuit, there will never be a need to conduct the evidentiary sufficiency review on a subsequent appeal, because these courts have, in post-*Richardson* decisions, adhered to a rule *requiring* an evidentiary sufficiency determination during the *initial* appeal. *United States v. Szado*, 912 F.2d 390, 393 (9th Cir. 1990), and cases cited therein; *United States v. Quinn*, 901 F.2d 522, 529 n.5 (6th Cir. 1990), and cases cited therein. Had this been the rule of the Fifth Circuit, Mr. Miller and Mr. Huls would have received the evidentiary review they now seek on their first appeal, and this case would now be over.

In light of the multiple circuit conflict, the time is ripe for a clarification of *Richardson*. This Court should therefore grant certiorari and recognize that, where there has been a complete trial ending in a verdict, a criminal defendant is entitled to

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[8] The *Anderson* and *Douglas* defendants apparently did not seek interlocutory review prior to the second trial. Presumably interlocutory review would be available under the Seventh Circuit's position. *See Abney v. United States*, 431 U.S. 651, 662-63 (1977).

adjudication of the evidentiary sufficiency at that trial at *some* point in the proceedings. Nothing in *Richardson* suggests otherwise.

The simple holding of *Richardson* is that an appellate court is not *required* to rule on the sufficiency of the evidence where there has been "only a mistrial resulting from a hung jury." 468 U.S. at 323. This rule furthers the public policy goal of "giving the prosecution one *complete* opportunity to convict those who have violated its laws." *Id.* at 324 (emphasis added) (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)). In contrast, in cases such as this one, the initial trial proceedings *have* been fully completed, and the defendants have properly presented their insufficiency claims to the initial appellate court but have "obtained no response." *Sneed*, 705 F.2d at 747. The prosecution has had its "one complete opportunity to convict," and the only reason we are here today is because the Fifth Circuit on the first appeal simply declined to consider the sufficiency of the evidence, even though this issue was properly before it.

Had the Fifth Circuit itself followed what it now calls the "better practice" and adjudicated defendants' evidentiary sufficiency claims in the initial appeal, Mr. Huls and Mr. Miller would today be free men. It would be unconscionable to subject the petitioners to the ordeal of a second trial simply because there was an error even more glaring than insufficient evidence that mandated reversal of their convictions. Accordingly, this Court should grant certiorari to resolve this important double jeopardy issue, which has split the circuit courts four different ways.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT ON WHETHER A DEFENDANT MAY BE RETRIED ON A THEORY OF CRIMINAL LIABILITY THAT THE PROSECUTION ABANDONED FOR STRATEGIC REASONS AT THE FIRST TRIAL

When the prosecution first indicted and tried the petitioners, it was aware of and could have presented to the jury a property rights theory of mail fraud. For strategic reasons, including a desire not to allow the jury to hear or consider evidence of the economic gain to the state and the loss to the lessee from the mineral leases in question, the prosecution chose not to characterize the alleged conduct as a scheme to deprive the state of property rights. Mr. Miller and Mr. Huls contend that when the government made that deliberate choice, jeopardy terminated on a property rights charge and the double jeopardy clause now prohibits it from obtaining a "second bite at the apple."

The Fifth Circuit concluded that the government's strategic choice was a "trial error" that permits another trial on the same facts but a different "theory" of the same crime. This decision conflicts with the holding of the Eighth Circuit in *United States v. Cavanaugh*, 948 F.2d 405 (8th Cir. 1991). And, as the Fifth Circuit itself concedes, App. 11a, the opinion below conflicts with the decisions of two district courts in cases almost identical to this one. *United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1989); *United States v. Gray*, 705 F. Supp. 1224 (E.D. Ky. 1988). Moreover, the Fifth Circuit's opinion is inconsistent with this Court's decision in *Grady v. Corbin*, *supra*.

In *Cavanaugh*, the defendants were prosecuted for an incident that had two possible characterizations: a continuous criminal assault culminating in murder, or a murder and a separate assault. At trial, the prosecution relied on the "continuous crime" theory and "abandoned any theory that there were two separate and distinct criminal acts." 948 F.2d at 413. The convictions were reversed for insufficient evidence of murder, and the government sought to retry the defendants on the

previously abandoned theory of a separate assault. After discussing the policies set forth by this Court in *Grady v. Corbin* and in *Green v. United States*, 355 U.S. 184 (1957), the Eighth Circuit concluded that, because the first jury's failure to consider the separate assault theory was due to a "deliberate, tactical decision by the prosecution," the double jeopardy clause barred reprosecution:

> We hold that principles of double jeopardy, which serve "a constitutional policy of finality for the defendant's benefit," . . . bar retrial for the assault charge when the government's deliberate trial strategy caused the first trial to terminate without the jury passing upon that charge. The prosecution could have presented the original jury with the theory it now wishes to advance on retrial. The defendants in this case should not be required to "run the gauntlet" a second time.

948 F.2d at 417 (citations omitted).

United States v. Gray, *supra*, was the same case, on remand, decided by this Court in *McNally v. United States*, *supra*. The district judge found that the defendants' jeopardy on "property rights" theories of mail fraud "terminated when the government failed to effectively pursue these theories" with the jury:

> The cases that apply the Double Jeopardy Clause limit both sides to one fair trial. . . . If a defect in a trial is caused by a procedural error or other error that cannot be fairly imputed to the prosecution, then the case can be retried because the government did not have a fair trial. On the other hand, if the error is caused by prosecutorial misconduct *or the prosecution's failure to present a particular theory to the jury*, the government should not be given a second bite at the apple.

705 F. Supp. at 1232 (emphasis added).

Similarly, the *Slay* court felt constrained to deny the government "a second bite at the apple" because the "prosecution focused its case on the good government theory and failed to really develop a property theory at the initial trial." 717 F. Supp.

at 696. Since the jury instructions "contained no elaboration of a property theory which would support a mail or wire fraud conviction," the double jeopardy clause barred reprosecution. *Id.* at 695. Exactly the same is true in the present case.[9]

Also directly supportive of the abandonment analysis is *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988), where the defendant was indicted for murder on theories of culpability as a principle, as an accomplice, and as a conspirator. The prosecution went to the jury on the conspiracy theory alone, and the jury returned a conviction, but the appellate court reversed for insufficient evidence of conspiracy. The prosecution's effort to retry the defendant on an accomplice theory was held barred by double jeopardy, because it was the prosecution's own inaction which resulted in the termination of the first trial without a verdict on the accomplice theory. 845 F.2d at 1407-08. Any other result would allow the prosecution to "go to the jury only on selected [theories], in effect holding the others in reserve for a subsequent or improved effort." *Id.* at 1408. *But see United States v. Davis*, 873 F.2d 900 (6th Cir.) (declining to apply *Saylor*), *cert. denied*, 493 U.S. 923 (1989) (with White and Blackmun, JJ., dissenting from denial of certiorari).

Gray, *Slay*, *Saylor* and *Davis* were all decided prior to *Grady v. Corbin*, which provides substantial additional support for the abandonment rationale. In *Grady*, this Court held that the double jeopardy clause prohibits the government from trying a defendant on charges that require proof of conduct for which the defendant has previously been tried. Noting the "tremendous additional burden" that is placed on a defendant "if he must face each of the charges in a separate proceeding," the *Grady* court imposed a

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[9] *Accord*, *United States v. Mandel*, 672 F. Supp. 864 (D. Md. 1987), where post-conviction relief was granted under *McNally*, and the district judge rejected a belated effort by the government to urge a bribery theory of the offense when the theory presented to the jury was solely "good government." *Id.* at 878 n.11. The Fourth Circuit affirmed, stating that Mandel "may not be tried for the same crime." 862 F.2d 1067, 1075 n.14 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989)

duty on the prosecution to use "adequate preparation and foresight" to avoid subjecting the defendant to more than one trial. 110 S. Ct. at 2095.

The Fifth Circuit in the present case dismissed *Grady v. Corbin* with the single comment that *Grady* "involved separate charges in a separate prosecution, however, and this case does not." App. 6a. Although the two prosecutions in petitioners' case were brought under the same statute, mail fraud, they are unquestionably "successive prosecutions" for purposes of the *Grady* rule. As noted above, the Fifth Circuit's supposed distinction was not deemed important by the Eighth Circuit in *Cavanaugh*, and it is difficult to square with the principle of double jeopardy announced in *Grady*. If the *Grady* rule depends on such an artificial distinction as whether the two theories of prosecution are contained in the same section or different sections of the United States Code, this Court should say so.

In light of the conflict in the circuit courts on whether the double jeopardy clause permits retrial on theories intentionally withheld from the jury by the prosecution at the initial trial, certiorari should be granted to resolve the conflict and to clarify the scope of *Grady*. This abandonment issue is clearly a recurring one that warrants review by this Court.

CONCLUSION

For all of the above reasons, this Court should grant certiorari.

Respectfully submitted,

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April 10, 1992

APPENDIX A

No. 90-3512

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Cross-Appellant,

VERSUS

MARSDEN W. MILLER, JR.,
and WILLIAM C. HULS,
Defendants-Appellants
Cross-Appellees.

Appeals From the
United States District Court
for the Middle District of Louisiana

(January 23, 1992)

Before BROWN, KING, and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

Following the reversal by this Court of the mail fraud convictions of defendants-appellants Marsden W. Miller, Jr. (Miller) and William C. Huls (Huls) because the indictment and the jury instructions permitted the jury to convict without finding the deprivation of a property right, the government brought a new indictment. In this pretrial appeal, both Miller and Huls appeal from the district court's order denying their motions to dismiss the indictment on double jeopardy and collateral estoppel grounds. The government cross-appeals from the district court's

collateral estoppel ruling to the extent that the district court thereby held that whether a stock sale by Huls to Miller was a sham was decided adversely to the government by acquittals on various counts at the first trial, and therefore may not be relitigated at the second trial.

Facts and Proceedings Below

The facts are drawn from our opinion under the first indictment, *United States v. Huls*, 841 F.2d 109, 110 (5th Cir. 1988):

> "William C. Huls, a prominent figure in the Louisiana oil industry, was a founder and principal owner of the Exploration Company of Louisiana (XCL), along with Marsden W. Miller, Jr. In March 1984, the Governor of Louisiana, Edwin Edwards, appointed Huls Secretary of the Louisiana Department of Natural Resources. The post carried with it membership on the Louisiana Mineral Board, which awards oil and gas leases on state lands. Huls asked the Louisiana Ethics Commission for an advisory opinion on his ties to XCL, submitting information that the Government characterized at trial as distorted and incomplete. In May 1984, the Commission issued an advisory opinion recommending that Huls be barred from participating in any Mineral Board decisions in which XCL would have a 'substantial economic interest.' La.Rev.Stat. § 42:1102(21). Huls sold his XCL stock to Miller in June 1984, a transaction that the Government later labeled a sham.
>
> "In July 1984, the Louisiana Mineral Board awarded a lease to drill oil and gas wells on state lands to a company called TIPCO. Although the bid was in TIPCO's name, TIPCO and XCL had formed a fifty-fifty partnership to submit it. Huls recommended to the Board that it grant the lease, and also successfully argued that TIPCO be relieved of the usual well depth and letter of credit requirements.
>
> "At trial the Government presented evidence that throughout this period, Huls continued to collect on an

> overriding royalty and on working interests in several XCL leases. The Government also showed evidence that XCL had given Huls a Mercedes, paid health insurance premiums, and paid for several airplane trips. Huls had allegedly pledged some of his royalty interests as collateral on an XCL note for over $5,000,000, giving him an interest in XCL's continuing viability. The government also presented evidence that Huls had an agreement to repurchase on demand a large block of the XCL stock he formerly held."

In November 1986, Miller and Huls were indicted on fifteen counts charging mail fraud and conspiracy to commit mail fraud. 18 U.S.C. §§ 2, 371, 1341. The indictment alleged that Huls' sale of his XCL stock to Miller was a sham, that Huls had other financial interests in XCL, that XCL had provided Huls various other benefits while he was in office, and that Huls and Miller conspired to hide these facts from both the Mineral Board and the Louisiana Ethics Commission. The indictment alleged that, despite having ties to XCL that mandated his recusal, Huls participated in the Board's decision to grant the leases to the XCL/TIPCO partnership.

Miller and Huls were convicted on only three and four counts, respectively, of the fifteen counts in the indictment. Miller was convicted on the conspiracy count and the two substantive counts relating to the granting of the leases. Huls was convicted on these same three counts, and also on one of the two substantive counts relating to the Ethics Commission. Both defendants were acquitted on all ten counts relating to the alleged sham stock sale.

While the defendants' appeal to this Court was pending, the Supreme Court decided *McNally v. United States*, 107 S.Ct. 2875 (1987), which held that mail fraud covers only fraudulent schemes intended to deprive the victim of money or property and rejected lower court decisions that had authorized convictions without proof of such conduct. This Court reversed the defendants' convictions in light of *McNally* because the

indictment and jury instructions did not require the government to prove all the elements of mail fraud. *Huls*, 841 F.2d at 112.[1]

The government procured a new, six-count indictment, which included two new counts that had not been charged in the first indictment. The district court granted the defendants' motion to dismiss these two new counts for prosecutorial vindictiveness, and the government has not appealed this ruling. Although the phrasing of the indictment has been changed in an attempt to comply with *McNally*, Miller and Huls now stand indicted again on essentially the same three and four counts, respectively, on which they were convicted at the first trial.

The defendants sought dismissal of the new indictment on double jeopardy and collateral estoppel grounds. The district court struck language from the indictment pertaining to the alleged sham stock sale but otherwise denied the motions. Arguing that retrial is barred on double jeopardy and collateral estoppel grounds, Miller and Huls have perfected this interlocutory appeal. The government has cross-appealed from the district court's order striking the allegations of the sham stock sale from count one of the indictment (the conspiracy count).

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[1] Our prior opinion concludes by stating:

"The Government also argues that the jury heard ample evidence that Huls and Miller did deprive the State of a property right—the right to manage its mineral wealth. We express no opinion on this assertion, for it is beside the point at issue before this Court. Even if the jury could have convicted Huls and Miller on the same evidence under a correct view of the elements of the offense, the conviction cannot stand if there is a real possibility that the jury convicted on an *incorrect* view.... The jury in the instant case was told several times that it was not required to find deprivation of a property right to convict. We cannot assume that these repeated instructions had no effect.

"In sum, the convictions must be reversed because the indictment and jury instructions did not require the jury to find all the elements of the crime.... Since reversal is based on defects in the indictment and jury instructions rather than on insufficiency of the evidence, there is no apparent obstacle to retrial, should the Government seek a new indictment. This Court expresses no opinion on the merits of any such case." *Id.*

Discussion

Miller and Huls contend that reprosecution is barred by the Double Jeopardy Clause. They advance three primary arguments in support of this contention. First, they argue that retrial is barred because the government never presented a valid mail fraud theory at the first trial, in particular in the jury instructions, and was not prevented from doing so by any adverse trial court ruling. Second, they contend the Supreme Court's recent ruling in *Grady v. Corbin*, 110 S.Ct. 2084 (1990), bars this reprosecution on a new theory not presented at the first trial, although available to the government there. Third, they argue that there was insufficient evidence to support a conviction on a valid mail fraud theory, and thus retrial is barred. Although some of these arguments are not without force, we must reject them under controlling Supreme Court precedent.

In a line of precedent almost a century old, the Supreme Court has repeatedly stressed that the Double Jeopardy Clause does not preclude the government from retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction. *Montana v. Hall*, 107 S.Ct. 1825, 1826 (1987); *United States v. Scott*, 98 S.Ct. 2187, 2193-94 (1978); *United States v. Tateo*, 84 S.Ct. 1587, 1589 (1964); *United States v. Ball*, 16 S.Ct. 1192, 1195 (1896). As the Court explained in *Tateo*:

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the Ball principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate

> courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." 84 S.Ct. at 1589.

The defendants fault the government for failing to present a valid (property rights) theory of mail fraud at the first trial. They further note that the government gained certain strategic advantages, including the exclusion of certain evidence favorable to the defendants, by not pursuing such a theory. Relying on cases such as *Davis v. Herring*, 800 F.2d 513 (5th Cir. 1986), they argue that double jeopardy principles bar reprosecution of a defendant on "charges that, through errors of law or strategy, are not ultimately presented to the jury." *Id.* at 519; *see also Grady v. Corbin*, 110 S.Ct. 2084 (1990). Both *Davis* and *Grady* involved separate charges in a successive prosecution, however, and this case does not. The government brings its charges under the very same criminal statute—mail fraud—under which it brought the first prosecution. Although this Court reversed the convictions in the first appeal because the Supreme Court in *McNally v. United States*, 107 S.Ct. 2875 (1987), invalidated an entire class of mail fraud prosecutions brought under the "good government" or "intangible rights" theories, the actual impact of *McNally* was that this Court found the indictment and jury instructions at the first trial to have been wanting. In the words of our opinion rendered in the first appeal, this Court reversed "because the indictment and jury instructions did not require the jury to find all the elements of the crime." *Huls*, 841 F.2d at 112. As this Court foreshadowed in the first appeal, both of these grounds for reversal are mere trial errors for which double jeopardy principles do not preclude retrial: "Since reversal is based on defects in the indictment and jury instructions rather than on insufficiency of the evidence, there is no apparent obstacle to retrial, should the Government seek a new indictment." 841 F.2d at 112. The Supreme Court has so held specifically with respect to defects in the charging instrument in *Montana v. Hall*, 107 S.Ct. 1825, 1827 (1987), and *United States v. Ball*, 16 S.Ct. 1192, 1195 (1896), and

with respect to jury instructions in *Forman v. United States*, 80 S.Ct. 481 (1960), cited in *Tateo*, 84 S.Ct. at 1589.

There is an exception to the *Ball* principle, however, where the appellate reversal is for insufficient evidence to support a conviction. In *Burks v. United States*, 98 S.Ct. 2141 (1978), the Supreme Court, overruling prior precedent, held that appellate court reversal of a conviction for insufficient evidence is the functional equivalent of a verdict of acquittal and thus bars reprosecution for the same offense. The defendants argue that the evidence at the first trial was insufficient to support a conviction on a valid mail fraud theory. They raised this claim at the first trial,[2] and they argue—not unreasonably—that they are entitled to a review of the sufficiency of the evidence at this time. It would be unconscionable, they argue, for them to have to endure the ordeal of a second trial simply because there was an even more glaring error that mandated reversal of their convictions in the first appeal.

A case on point supporting the defendants' claim that they are entitled to a review of the sufficiency of the evidence at the first trial is *United States v. Sneed*, 705 F.2d 745 (5th Cir. 1983). In *Sneed*, the defendant's conviction had been reversed in an earlier appeal for errors in the jury selection at his trial. *Id.* at 746. The Court at that time declined to address his alternative contention that the evidence was insufficient to sustain the jury's verdict. *Id.* In an interlocutory appeal from the trial court's refusal to halt a pending retrial as barred by the Double Jeopardy Clause, this Court held that it had jurisdiction to hear the appeal and, because evidence at the first trial was insufficient, retrial was barred by double jeopardy principles. *Id.* at 747-50. In *Sneed* we distinguished *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 102 S.Ct. 141 (1981), in which this Court declined to entertain an appeal seeking review of the sufficiency of the evidence at the first trial following a mistrial for a hung jury, and *United States v. Rey*, 641 F.2d 222 (5th Cir.), *cert.*

[2] Although only Huls clearly raised this issue in the first appeal, each defendant adopted the arguments made in his codefendant's brief. They do the same in this appeal.

denied, 102 S.Ct. 318 (1981), in which this Court refused to hear a similar appeal following a trial judge's grant of a new trial, after a guilty verdict, because of "arguably erroneous" jury instructions. The basis on which *Sneed* distinguished *Becton* and *Rey* was that in both those cases "we considered the appeals efforts to obtain review of the actions taken on motions to acquit made in earlier trials," while the *Sneed* appellant was not seeking reconsideration of the earlier panel's refusal to address the sufficiency of the evidence issue on the first appeal. *Sneed*, 705 F.2d at 747.

Although *Sneed* directly supports the defendants' double jeopardy arguments, we conclude that it is no longer good law because an intervening Supreme Court decision has resolved the question adversely to the defendants. In *Richardson v. United States*, 104 S.Ct. 3081 (1984), the Supreme Court held that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* at 3086; *see also Justices of Boston Municipal Court v. Lydon*, 104 S.Ct. 1805, 1813-14 (1984). We recognize that *Richardson* was an appeal asserting a double jeopardy claim which followed a mistrial,[3] but its holding is clearly not limited to such cases. It refuses to extend *Burks* beyond instances in which the appellate court in fact reversed for insufficient evidence. As the Court explained: "Our holding in *Burks* established only that an appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal ...." 104 S.Ct. at 3086. The central concept of *Richardson* is that there is no *double* jeopardy unless the original jeopardy has *terminated*; and it is abundantly clear that a reversal

[3] At the original trial the defendant unsuccessfully moved for judgment of acquittal at the close of the government's case in chief and at the close of all the evidence; the case was submitted to the jury, which returned an acquittal on one count but was unable to agree on the other two counts. The district court therefore declared a mistrial on the latter two counts, and scheduled retrial as to them. The defendant then renewed his motion for judgment of acquittal on the latter two counts and also moved to bar retrial on the basis of double jeopardy; the district court denied both motions, and the defendant promptly appealed. *Id.* at 3082-83.

for instructional error is no more a termination of jeopardy than a mistrial where the jury is unable to agree.[4] And it is evident that the implications of *Richardson* for a case such as this one did not escape the attention of the *Richardson* court. Indeed, Justice Brennan in dissent complained of the Court's narrow reading of *Burks*: "Apparently, under the Court's approach, only an actual judgment of acquittal, or an unreversed conviction, would 'terminate' jeopardy and thereby bar retrial." *Id.* at 3087 (Brennan, J., dissenting). He further complained that the Court's holding in *Burks* could be undermined by appellate court refusals to rule on insufficiency of the evidence claims and instead reversing on other grounds. *Id.* at 3089.

The defendants argue that *Richardson* actually supports their position because the Supreme Court reversed a lower court's dismissal of the appeal for lack of jurisdiction, and rejected the double jeopardy claim on the merits for reasons limited to jurisprudence related to mistrials. We disagree. The Court assumed jurisdiction over the appeal because it found the double jeopardy question to have been colorable, in light of the differing rulings in the various courts of appeals. After resolving the question on the merits adversely to the defendant in that case, the Court noted that a future appeal raising the same question would no longer be colorable and consequently would not be appealable before final judgment. *Id.* at 3086 n.6.[5] As noted, the basis of the ruling was merely that the original jeopardy had not terminated, not anything limited or peculiar to mistrials.

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[4] We observe that *Sneed* does not even address the termination of jeopardy concept on which *Richardson* rests, much less suggest that appellate reversal for trial error is more of a termination of jeopardy than a hung jury mistrial or a trial court post-verdict new trial. Conversely, *Richardson* does not rely on the theory (which *Sneed* attributes to *Becton* and *Rey*) that the defendant there was seeking review of the rulings on his motions for judgment of acquittal.

[5] We likewise find the double jeopardy claim in this appeal to be colorable in light of our prior holding in *Sneed*, and we have therefore reached the merits of the double jeopardy claim. In light of our holding today, future appeals raising similar claims will no longer be colorable and will not be appealable before final judgment in this Circuit.

The defendants argue that various post-*Richardson* cases have held that a defendant is entitled to a review of the sufficiency of the evidence at the first trial prior to retrial. In general, however, these cases hold only that an appellate court should, or in the exercise of its discretion normally will, review the sufficiency of the evidence as well even if it has already determined that a conviction must be reversed on other grounds. In *United States v. Szado*, 912 F.2d 390 (9th Cir. 1990), a district judge ruling on an appeal from a non-jury trial before a magistrate declined to review the sufficiency of the evidence and reversed on other grounds. On further appeal, the Ninth Circuit held that the district judge should have reviewed the sufficiency of the evidence despite the presence of other grounds for reversal, because a finding of insufficient evidence would preclude retrial. *Id.* at 393. The Ninth Circuit applies a similar rule when it is an appellate court of the first instance reviewing a conviction before a district judge. *Id.* The Sixth Circuit has also determined that it will review the sufficiency of the evidence even if the conviction will be reversed on other grounds. *United States v. Quinn*, 901 F.2d 522, 529 n.5 (6th Cir. 1990). The Seventh Circuit has held that it will review the sufficiency of the evidence even if it has determined that the conviction must be reversed on other grounds, not because *Burks* or *Richardson* commands that it do so, but because it has determined to do so as a matter of policy. *United States v. Anderson*, 896 F.2d 1076, 1078 (7th Cir. 1990). Far from holding that a review of the sufficiency of the evidence can be had later if a conviction is reversed on other grounds, these cases indicate that the sufficiency of the evidence will be reviewed in the first appeal *in order* to prevent defendants from having to face a second trial where there was insufficient evidence to convict at the first trial. Likewise, in *United States v. Kozminski*, 108 S.Ct. 2751 (1988), in which the Supreme Court affirmed the reversal of a conviction by the Sixth Circuit for faulty jury instructions, the Supreme Court merely concurred with the lower court's conclusion that retrial was not barred because there was sufficient evidence to support a conviction under the stricter standard upheld by the Supreme Court. *Id.* at 2765. The Court did not suggest that the Sixth Circuit was required to reach the

sufficiency of the evidence question, nor did it indicate that such a claim could be raised later if the court of appeals had declined to decide it. *Id.*

Some other post-*Richardson* cases support the defendants' argument that they are entitled to a review of the sufficiency of the evidence at this time. In *United States v. Slay*, 717 F.Supp. 689 (E.D. Mo. 1989), a district court dismissed a new indictment after the first conviction was set aside by the same court prior to sentencing after the Supreme Court decided *McNally* and rejected the "good government" theory that predominated in *Slay*. The court held that retrial was barred because the government "failed to really develop a property theory at the initial trial." *Id.* at 696. *Slay* relied heavily on *United States v. Gray*, 705 F.Supp. 1224 (E.D. Ky. 1988), which was the Supreme Court's *McNally* case on remand, and which also refused to allow a retrial because valid mail fraud theories, although "technically presented" to the jury, "were in reality not presented to the jury." *Id.* at 1233.[6] None of these cases cite *Richardson*, and we are unable to reconcile their results with the Supreme Court's holding in *Richardson*. The Third Circuit has also come very close to endorsing the rule advocated by the defendants here. In *Vogel v. Commonwealth of Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986), the court reaffirmed its prior rule that "when a defendant raises an insufficiency of evidence contention that the trial court finds unnecessary to address [because it grants a new trial on other grounds], a court subsequently presented with a double jeopardy argument must address and resolve that issue." The case *sub judice* differs from *Vogel* in that it involves the setting aside of a conviction by an appellate court and not a trial court, but that distinction strikes us as unimportant in light of the Supreme Court's holding in *Burks* and *Richardson's* reliance on the fact

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[6] *In United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 3190 (1989), the Fourth Circuit affirmed a district court order setting aside the ten-year-old convictions of Governor Mandel and his codefendants in light of the Supreme Court's *McNally* decision. The court further observed: "Mandel, et al[.], may not be tried for the same crime. The Supreme Court has made that clear in *McNally*." *Id.* at 1075-76 n.14. The court does not elaborate on this comment, which is buried in a footnote.

that there was no termination of jeopardy. *Vogel* does not discuss *Richardson*, however, and to the extent it would indicate that the defendants are entitled to a review of the sufficiency of the evidence at this time following the reversal of their convictions on other grounds and the denial by the district court of their motions to dismiss the indictment for double jeopardy, we respectfully decline to follow *Vogel*.

Following *Richardson*, we hold that double jeopardy does not bar this retrial, and because under Richardson jeopardy has not terminated, double jeopardy will not be available as a ground for challenging any subsequent conviction that may result. *See United States v. Richardson*, 702 F.2d 1079, 1092-94 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom. Richardson v. United States*, 104 S.Ct. 3081 (1984).[7] We note that our holding in this respect, and our construction of this portion of the Supreme Court's opinion in *Richardson*, is supported by the holding and opinion of the First Circuit in *United States v. Porter*, 807 F.2d 21 (1st Cir. 1986).

Although not mandated by the double jeopardy clause, it is accordingly clearly the better practice for the appellate court on an initial appeal to dispose of any claim properly presented to it that the evidence at trial was legally insufficient to warrant the thus challenged conviction.

The defendants also argue that collateral estoppel bars the government from now charging them with participation in a sham stock sale. Miller further argues that collateral estoppel

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[7] Although some had warned prior to *McNally* that "good government" mail fraud prosecutions were on uncertain ground, *see United States v. Curry*, 681 F.2d 406, 418 (5th Cir. 1982) (concurring opinion), we find no deliberate prosecutorial overreaching that might bar retrial. *See Robinson v. Wade*, 686 F.2d 298 (5th Cir. 1982). The first indictment here was returned years after *Curry* was handed down, and the majority opinion there clearly authorized such a theory. Certiorari was granted in *McNally* before this case was tried, though after the intangible rights theory first indictment had been returned. *See McNally v. United States*, 107 S.Ct. 642 (1986) (*McNally* was argued in the Supreme Court about a week after the trial here concluded). Nevertheless, the government was not guilty of overreaching for trying this case in accordance with the then clear law of this Circuit.

bars the government from charging him with participation in a fraud on the Louisiana Ethics Commission. The district court deleted the allegations of the sham stock sale from the indictment,[8] but the defendants argue that because the indictment relies substantially on these allegations, mere deletion of the invalid charges will not suffice; instead, the entire indictment must be dismissed. They argue alternatively that the indictment has been so altered that it must be dismissed and that the indictment is now insufficient to state a mail fraud offense.

Although denominated by defendants as a claim of collateral estoppel, this is actually an attack on the sufficiency of the indictment for which this Court lacks jurisdiction to entertain in an interlocutory appeal. *Abney v. United States*, 97 S.Ct. 2034, 2042 (1977), *United States v. Slay*, 858 F.2d 1310, 1313-14 (8th Cir. 1988). Accordingly, this portion of the defendants' appeal must be dismissed, without prejudice to their right to raise the contention in a later appeal if they are convicted.

In his reply brief, Miller alternatively seeks the more limited relief of deletion of those portions of the indictment charging him with participation in a fraud on the Ethics Commission. Under some circumstances, a pretrial appeal is available to seek deletions from an indictment on collateral estoppel grounds. *See United States v. Larkin*, 611 F.2d 585, 586 (5th Cir. 1979) (on petition for rehearing). Nonetheless, Miller failed to raise as a point of error in his appeal his argument that he is entitled to additional deletions from the indictment, raising it only in his reply brief. Accordingly, this issue has been waived. *See United States v. Winn*, No. 90-1110, slip op. 1094 at 1108 (5th Cir. Nov. 20, 1991); *United States v. Mejia*, 844 F.2d 209, 214 n.1 (5th Cir. 1988). *See also, e.g., Najarro v. First Fed. Sav. & Loan Ass'n*, 918 F.2d 513, 516 (5th Cir. 1990). Because we deem this issue not to have been properly preserved for our review in this interlocutory appeal, Miller, if necessary, will be able to seek review of this aspect of the district court's double jeopardy ruling in a subsequent appeal if he is convicted.

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[8] The district court did not accept Miller's collateral estoppel argument with respect to the allegations that Miller was part of a scheme to defraud the Ethics Commission and therefore did not strike that language from the indictment.

The government has filed a cross-appeal in this case, contending the district court erred in holding that the doctrine of collateral estoppel bars the government from relitigating the issue of whether the stock sale was a sham. The government cannot appeal in a criminal case without express statutory authorization. *See, e.g., United States v. Martin Linen Supply Co.*, 97 S.Ct. 1349, 1352 (1977). This Court has jurisdiction to hear the appeal, if at all, under 18 U.S.C. § 3731, which supplies that authorization in specified instances.[9] The government argues that the district court's deletion of the sham stock sale allegations from the indictment restricted the evidence that it could present at trial and is thus appealable under § 3731. We find this argument to be reasonable, even though the order the government seeks to appeal is not denominated a "suppression order" and did not purport to exclude evidence as such. *See United States v. Helstoski*, 99 S.Ct. 2432, 2439 n.6 (1979). Nonetheless, the government concedes that it failed to file a timely certificate with the district court "that the appeal was not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding," although § 3731 required it to do so. The government has now filed such a certificate, and correctly notes

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[9] Section 3731 provides in pertinent part as follows:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

"An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [sic] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

• • •

"The appeal in all cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

"The provisions of this section shall be liberally construed to effectuate its purposes."

that the late filing, although not regarded with favor, does not rise to jurisdictional dimensions. *United States v. Crumpler*, 507 F.2d 624 (5th Cir. 1975).

However, the equities of this case, involving a second prosecution, do not favor excusing the government's tardy filing of its § 3731 certificate. The certificate was filed seven months after the entry of the district court's order and six months after the filing of the government's notice of appeal. It was filed only after the defendants raised the issue of its absence in their briefs to this Court. If the requirement of the timely filing of a certificate is to have substantial meaning, the government's appeal here should be dismissed. Indeed, the purpose of the certificate requirement is to ensure the government has verified the propriety of its appeal, and so certified to the district court, at the time it files its notice of appeal. That purpose is defeated by the perfunctory filing of the certificate after the appeal has been docketed and briefed and within days of its argument in this Court.[10]

The government in the alternative argues that the district court's order can be viewed as dismissing a count of the indictment, which is appealable under § 3731 without the filing of a certificate. We disagree. Some courts have allowed such appeals if the stricken language would constitute an entire discrete or independent basis of liability that could have been charged as a separate count. *United States v. Levasseur*, 846 F.2d 786, 790 (1st Cir. 1988); *United States v. Tom*, 787 F.2d 65, 69-71 (2d Cir. 1986); *United States v. Margiotta*, 662 F.2d 131, 139-40 (2d Cir. 1981). We do not consider that to be the case here. And clearly, it was not duplicitous to include the stock sale language in count one. Moreover, because the striking of language almost always limits the government in its proof at trial, such appeals

[10] We do agree with the government's observation that one of the purposes of requiring the certificate—ensuring the appeal is not taken for the purpose of delay—is of more limited concern where, as here, the defendants have already delayed the trial by their own appeal. Nonetheless, we do not believe the defendants' appeal obviates the need for the certificate, particularly where, as here, the government successfully contends that this Court lacks jurisdiction to entertain the defendants' collateral estoppel claims at this time.

normally can be taken under the second paragraph of § 3731 upon the filing of the required certificate. Accordingly, we believe it inappropriate to read the first paragraph of § 3731 broadly to avoid the certificate requirement here. There in no pending trial to delay when an entire indictment has been dismissed, and that is the reason no certificate is required for the government to appeal such a dismissal.[11] Here the indictment was not dismissed, and the government does not complain of the dismissal of any entire count, and we refuse to imply a dismissal in order to contravene the certificate requirement. We do not exclude the possibility of allowing appeals under the first paragraph of § 3731 that do not in terms involve the dismissal of an entire count or counts of an indictment, but to come under the first paragraph the district court must have done substantially more than merely limit the government's proof at trial.

Conclusion

For the foregoing reasons, we AFFIRM in part with respect to the appeals of Miller and Huls, DISMISS in part their appeals for lack of jurisdiction, and DISMISS the government's cross-appeal.

AFFIRMED in part; DISMISSED in part.

[11] Similarly, where one or more entire discrete counts have been dismissed, there is no pending trial of those counts to be delayed, even if others remain to be tried.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES VERSUS WILLIAM C. HULS MARSDEN W. MILLER, JR.	CRIMINAL ACTION NO. 86-92-B

MEMORANDUM AND ORDER

Defendants William C. Huls and Marsden W. Miller, Jr. were founders and principal owners of the Exploration Company of Louisiana ("XCL"), a company involved in oil and gas exploration. In 1984, Huls became the Secretary of the State of Louisiana Department of Natural Resources ("DNR"). As Secretary, Huls participated in decisions of the Louisiana Mineral Board, the public agency charged with the responsibility of awarding oil and gas leases on state lands.

In late 1986, the United States brought charges against Huls and Miller alleging that Huls and Miller had conspired "to allow [Huls] to maintain a substantial economic and financial interest in XCL without there appearing to be a conflict of interest with his duties as Secretary of DNR," and "to allow [Huls] to serve on the Mineral Board and perform official acts and transactions that were beneficial to XCL . . . despite his having substantial economic and financial interests in XCL at the time." Original Indictment, Count 1, ¶ 18. In addition, the government alleged that Huls and Miller had conspired to deceive and had deceived the Louisiana Mineral Board and Louisiana Ethics Commission about Huls' financial interests in XCL in violation of 18 U.S.C. §§ 341 & 1341 (conspiracy to commit mail fraud and mail fraud).

The conspiracy count of the original indictment (Count 1) alleged that these actions constituted "a scheme and artifice to defraud the citizens of the State of Louisiana of their right to the honest, faithful and impartial services of WILLIAM C. HULS,

and of the right to have the functions of DNR, the Mineral Board, and the Ethics Commission administered honestly, fairly, impartially, free from abuse, free from corruption, free from self-dealing, and with all information which is material to their business . . . ." Original Indictment, Count 1, ¶ 17. The substantive counts of the original indictment (Counts 2-15) alleged specific acts in furtherance of the scheme.

Both defendants were found guilty of the conspiracy count. Huls was found guilty of Count 2, but Miller was not. Both were found guilty of Counts 6 and 7. Both defendants were acquitted on Counts 3-5, and 8-15.

The convictions were overturned on appeal, *United States v. Huls*, 841 F.2d 109 (5th Cir. 1988), on the basis of the Supreme Court's decision in *McNally v. United States*, 107 S. Ct. 2875 (1987). In *McNally*, the Supreme Court held that the mail fraud statute "does not refer to the intangible right of the citizenry to good government," *id.* at 2879, and "is limited in scope to the protection of property rights." *Id.* at 2881. Following *McNally*, the Fifth Circuit held that because the indictment and jury instructions did not require the jury to find a deprivation of a property right, the convictions of Huls and Miller could not stand. *Huls*, 841 F.2d at 112.

Defendants were re-indicted on December 29, 1988. The second indictment charges that defendants conspired "to obtain property rights of the State and to retain those property rights by means of the use of false pretenses, representations and promises." Second indictment, Count 1, para. 20. Counts 2-6 of the second indictment allege substantive counts of mail fraud.

Defendants' pre-trial motions were referred to Magistrate Stephen Reidlinger.[1] The Magistrate issued his report on the dispositive motions and his rulings on the nondispositive motions on January 12, 1990. The parties timely filed objections to the Magistrate's report and recommendation on January 22, 1990. When a party files a timely written objection to a magistrate's report and recommendation, the district judge conducts a de novo determination of those portions of the report objected to. *See* 28 U.S.C. § 636(b)(1).

I. Double Jeopardy

In his report, Magistrate Reidlinger recommended that defendants' Joint Motion to Dismiss on Double Jeopardy Grounds be denied. The Magistrate held: 1) that defendants had not been exposed to a "property rights" theory of mail fraud in the first indictment and trial; and 2) that the evidence presented at the first trial need not be reviewed to determine whether it is sufficient to convict defendants under a property loss theory of mail fraud. Defendants object on the grounds that the government's binding admissions reveal that defendants were exposed to a "property rights" theory of mail fraud, and that the

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[1] The following dispositive motions were referred for a report and recommendation: 1) Defendants' Joint Motion to Dismiss on Double Jeopardy Grounds; 2) Defendant Miller's Motion to Dismiss for Failure to Charge a Crime; 3) Defendant Huls' Motion to Dismiss for Failure to Charge a Crime, or in the Alternative, Strike All Allegations of Nondisclosure; 4) Defendants' Joint Motion to Dismiss Counts 3 and 4 for Prosecutorial Vindictiveness; 5) Defendant Huls' Motion to Dismiss Based on Collateral Estoppel; and 6) Defendant Miller's Motion to Dismiss Based on Collateral Estoppel and Double Jeopardy.

In addition, the following nondispositive motions were referred: 1) Defendants' Joint Motion to Strike Prejudicial Surplusage; 2) Defendants' Joint Motion for a Bill of Particulars; 3) Defendants' Joint Motion for Inspection of Grand Jury Concurrance Slip; 4) Defendants' Joint Motion for Leave to File Discovery Motions; 5) Defendants' Joint Motion to Compel Disclosure of Exculpatory Information; 6) Defendants' Joint Motion for Production of Documents Material to Preparation of the Defense; 7) Defendants' Joint Motion for a Change of Venue (based upon prejudicial pretrial publicity; 8) United States' Motion to set a Time Certain Within Which Trial Must Commence.

controlling law mandates a review of the evidence presented at the first trial.[2]

The double jeopardy clause of the fifth amendment to the Constitution of the United States provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." This clause prohibits: 1) a second prosecution for the same offense after acquittal or conviction; and 2) multiple punishments for the same offense imposed in a single proceeding.[3] The clause does not prohibit further prosecution on the same charge following the reversal of a conviction on any ground other than insufficiency of the evidence.[4] As the Supreme Court stated in *Montana v. Hall*, 107 S. Ct. 1825, 1827 (1987), "[i]t is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument." *Hall*, 107 S. Ct. at 1827 (citing *United States v. Ball*, 163 U.S. 662, 672, 16 S. Ct. 1192, 1195 (1896)).

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[2] The government does not object to the Magistrate's recommendation. The government does object, however, to the Magistrate's finding that at the pre-trial conference held on March 20, 1987, the United States Attorney stated "that the government could prove an actual financial loss." Magistrate's Report at 6. Although it is doubtful that this qualifies as a "finding," what the United States Attorney actually said was: "The government takes the position, and will take the position throughout, that we can comply with Judge Garwood's concurring opinion throughout this trial, in [*United States v. Curry*, 681 F.2d 406, 418 (5th Cir. 1982) (mail fraud statute does not apply where scheme does not contemplate the perpetrator's acquisition or the victim's deprivation of either something tangible or some actual or potential economic benefit)]." Tr. of Pre-trial Conference of March 20, 1987, at 51.

[3] See *Grady v. Corbin*, 110 S. Ct. 2084, 2090 (1990); *Jones v. Thomas*, 109 S. Ct. 2522, 2525 (1989) (citing *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S. Ct. 2536, 2540 (1984); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969)).

[4] See *Montana v. Hall*, 107 S. Ct. 1825, 1826 (1987) (per curiam) (citing *Burks v. United States*, 437 U.S. 1, 15, 98 S. Ct. 2141, 2149 (1978); *United States v. Scott*, 437 U.S. 82, 90-91, 98 S. Ct. 2187, 2193 (1978)); *see also United States v. Moody*, No. 88-6106, slip op. at 4430, 1990 WL 70428 at 11 (5th Cir. May 30, 1990).

A. Defendants were not Exposed to a Property Rights Theory of Mail Fraud at the First Trial.

If defendants were exposed to a property rights theory of mail fraud at their first trial, the double jeopardy clause would bar a retrial. *See United States v. Davis*, 873 F.2d 900, 905 (6th Cir.), *cert. denied*, 110 S. Ct. 292 (1989). Defendants argue first that the statements made by the government attorneys in both the trial court and the court of appeals reveal that the government refused to limit itself to prosecuting defendants solely on an intangible rights theory, and that defendants were exposed to prosecution on a property rights theory as well. Defendants cite: 1) the government's refusal to be pinned down on any particular theory[5]; 2) Judge Polozola's statement at the pre-trial conference that he would give a charge acceptable to defendants[6]; 3) the United States Attorney's statement at the pre-trial conference that the government would comply with Judge Garwood's concurring opinion in *United States v. Curry*, 681 F.2d 406, 418-25 (5th Cir. 1982)[7]; 4) evidence introduced and arguments made at trial by which the government attempted to show that the State had suffered an actual property loss[8]; and 5) the government's argument in the court of appeals that defendants had been indicted, tried, and convicted on a property rights theory and that the evidence was sufficient to sustain a conviction on the property rights theory.[9]

With respect to the statements made by government attorneys during the first trial, the entire record (including the indictment, pre-trial conferences, pre-trial instructions, closing

[5] See Defendants' Memorandum in Support of Objections to Magistrate's Report and Recommendations on Motion to Dismiss on Double Jeopardy Grounds at 11 [hereinafter Defendants' Double Jeopardy Objections].

[6] See *id.* at 11-12.

[7] See *id.* at 12-13.

[8] See *id.* at 15-16.

[9] See *id.* at 18-19.

statements, and the jury charge) clearly reveals that defendants were prosecuted only on an intangible rights theory.[10] Despite defendants' repeated objections to a definition of mail fraud which did not require the jury to find that the State suffered an actual or intended loss of property rights,[11] Judge Polozola made it clear that no such requirement existed under pre-*McNally* jurisprudence. And the Fifth Circuit found that: "the indictment and the court's instructions to the jury nowhere require the jury to find that [defendants] deprived the state . . . of a property right. Indeed, the indictment and instructions are permeated by the pre-*McNally* 'right to honest government theory.' " *Huls*, 841 F.2d at 111.

With respect to the statements made by the government in the court of appeals, defendants contend that these statements "constitute binding judicial admissions which the government is not now at liberty to rescind." Defendants' Double Jeopardy Objections at 21. Defendants rely on *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 108 (5th Cir. 1987) (per curiam) for the proposition that "factual assertions in pleadings are . . . . judicial admissions *conclusively* binding on the party that made them." The flaw in defendants' argument is that the government's statements and arguments are not factual assertions; rather, they are legal arguments made in support of the government's position on appeal. As Magistrate Reidlinger recognized, in the context of the entire record, the statements and arguments made by the government on appeal can only be viewed as an attempt to preserve the convictions in the face of *McNally* and thereby avoid the time and expense of going forward with a new trial.

Defendants argue also that the due process clause "precludes the government from imposing penalties on a defendant on a basis that totally contradicts the government's prior explicit

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[10] See Pre-trial conference transcript (March 20, 1987) at 27-41; 45-58; Trial Transcript, Volume II at 42-43 (pre-trial instructions), 53-60; Trial Transcript, Volume XV (E) at 62-64 (jury charge); Trial Transcript, Volume XV at 206-07 (government's closing statement), 307 (Huls' closing argument); and Trial Transcript, Volume XVI at 17-19 (re-charge).

[11] See Pre-trial Conference Transcript (March 20, 1987) at 38-41; 48-51; Trial Transcript, Vol II. at 54-59; and Charge Conference Transcript at 35-36.

representations." Defendants' Double Jeopardy Objections at 21. Defendants rely on *Raley v. Ohio*, 360 U.S. 423, 437-38, 79 S. Ct. 1257, 1266 (1959). But *Raley* does not extend as far as defendants would like. Rather, *Raley* teaches that the state cannot convict a citizen for exercising a privilege which the state had told him was available to him. *Id.* at 438, 79 S. Ct. at 1266. *Raley* is inapplicable here, because the government's representations in this case were attempts to characterize what occurred at the trial, not representations to the defendants concerning their legal rights. I find defendants' due process argument unpersuasive.

Even if the government did not expressly allege or actively pursue a property rights theory of mail fraud in the trial court, defendants contend that the government should have done so, and the failure to do so precludes the government from trying defendants again on a different theory of the same crime. In support of this argument, defendants rely primarily upon *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170 (1978). In *Sanabria*, the government charged the defendant, in a single count indictment, with conducting an illegal gambling business in violation of 18 U.S.C. § 1955. The government alleged two different theories of the crime. The trial judge erroneously excluded evidence concerning one of the theories and entered a judgment of acquittal for insufficient evidence without distinguishing between the two theories. The Supreme Court, stating that the limitations of the double jeopardy clause could not be avoided "by the simple expedient of dividing a single crime into . . . 'discrete bases of liability' not defined as such by the legislature," held that the double jeopardy clause barred reprosecution. *Id.*, 437 U.S. at 72, 98 S. Ct. at 2183 (citations and footnotes omitted). Defendants argue that "[i]t follows that the government was required to allege and prove in the previous trial *any and all* mail fraud theories it cared to pursue." Defendants' Double Jeopardy Objections at 26 (emphasis in original).

However, *Sanabria* is not controlling here. *Sanabria* does not require the government to pursue every conceivable theory available to it. Rather, *Sanabria* precludes retrial on a different theory only when that theory is presented in a *valid* indictment

and the defendant is *acquitted* of the charges contained within the indictment. In this case, defendants Huls and Miller were *convicted* on a *defective* indictment. As the Fifth Circuit stated, "the indictment and the jury instructions did not require the jury to find all the elements of the crime." *Huls*, 841 F.2d at 112. Therefore, *Sanabria* does not preclude retrial on a property rights theory of mail fraud.

Moreover, in the only post-*McNally* appellate decision on precisely the same question presented here, the Sixth Circuit ruled that the double jeopardy clause does not prohibit retrial. *See United States v. Davis*, 873 F.2d 900 (6th Cir.) (Nelson, J.), *cert. denied*, 110 U.S. 272 (1989).[12] In *Davis*, the defendant had been prosecuted only on an intangible rights theory. Declining to apply double jeopardy, the *Davis* court carefully distinguished a prior Sixth Circuit decision relied upon by defendants: *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988). In *Saylor*, the defendant had been tried on an indictment that had embodied two distinct legal theories. One of the theories was "inexplicably ignored in the instructions to the jury." *Davis*, 873 F.2d at 904. Because the error could be attributed to the prosecution, the court held that the double jeopardy clause barred a retrial. *Id.* at 905.

In *Davis*, the court concluded that the trial error could not fairly be imputed to the prosecution:

> [N]o . . . fault could be attributed to the *Davis* prosecutor in deciding to base the indictment of Mr. Davis on an "intangible rights" theory alone. That decision was perfectly legitimate when made, the intangible rights theory having been endorsed by this court only weeks before in the very case that was ultimately to produce the *McNally decision.*
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> The prosecutor gained no unfair advantage by limiting the indictment of Mr. Davis to an intangible rights theory. Had the prosecutor been given the prescience to

[12] Defendants question the validity of *Davis*. They point to the fact that Justices White and Blackmun dissented from the denial of certiorari, and that Magistrate Reidlinger did not rely on *Davis* in his report. Nonetheless, *Davis* is indistinguishable from this case, and it is the only appellate decision on these facts.

> realize that *Gray* would be reversed in *McNally*, the indictment in *Davis* would unquestionably have been drawn differently. . . . The potential for prosecutorial abuse that led us to find a termination of Jeopardy in *Saylor* simply had no counterpart here.

Davis, 873 F.2d at 905 (citations omitted). The court went on to conclude that the error was a defect in the indictment, and that the government may re-try defendants on a proper theory of mail fraud never presented in the original charging instrument. *Id.* at 906-07.

Defendants point to other cases holding that double jeopardy bars the reprosecution of a defendant who has overturned his mail fraud conviction on appeal.[13] These cases are also distinguishable, for the same reason that *Saylor* did not govern in *Davis*. The indictments in these cases charged *both* property and intangible rights theories, and the government simply failed to present the property rights theory to the jury. As in *Saylor*, the error was attributable to the government: "[t]he government could have pursued these theories in separate counts in drafting the indictment or requested that special interrogatories be submitted to the jury on each theory. However, the government did not pursue these methods and included all theories in each count." *United States v. Gray*, 705 F. Supp. 1224, 1231 (E.D. Ky. 1988). For these reasons, the government's decision to proceed solely on an intangible rights theory does not preclude retrial on a property rights theory.

B. Sufficiency of the Evidence

Alternatively, defendants contend that the evidence presented at the first trial is insufficient to sustain a conviction on retrial. The Magistrate concluded "that requiring an appellate court, or this court, to review the sufficiency of the evidence would be fruitless because the evidence offered was never intended to prove an actual or intended property loss." Report at 9.

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[13] See *United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1989); *United States v. Gray*, 705 F. Supp. 1224 (E.D. Ky. 1988).

Defendants argue that under established precedent, "a defendant who claims there was insufficient evidence to support his conviction is entitled to an adjudication of that claim prior to retrial, even if the conviction is reversed for reasons other than evidentiary sufficiency." Defendants' Double Jeopardy Objections at 33. Defendants rely on *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141 (1978) and *United States v. Sneed*, 705 F.2d 745 (5th Cir. 1983) (Rubin, J.).

In *Burks*, the Supreme Court held that an appellate court's reversal of a conviction based upon insufficiency of the evidence is the equivalent of an acquittal, and therefore the double jeopardy clause precludes a retrial on the same charges. *See United States v. Moody*, No. 88-6106, slip op. at 4430, 1990 WL 70428 at 11 (5th Cir. May 30, 1990); *United States v. Anderson*, 896 F.2d 1076, 1077 (7th Cir. 1990) (Bauer, C.J.). In *Sneed*, the Fifth Circuit read *Burks* broadly, holding that even when the conviction is reversed on the basis of trial error, the double jeopardy clause precludes retrial if the evidence presented in the first trial is insufficient to sustain a conviction. *Sneed*, 705 F.2d at 747-48. However, in *Richardson v. United States*, 468 U.S. 317, 323, 104 S. Ct. 3081, 3085 (1984), the Supreme Court expressly rejected this interpretation: "*Burks* simply does not require that an appellate court rule on the sufficiency of evidence because retrial might be barred by the Double Jeopardy Clause."

Even assuming that the *Sneed* rule remains valid in *Richardson's* wake,[14] its applicability is questionable in this case, for as Magistrate Reidlinger recognized, the government never charged nor intended to present evidence that the State of Louisiana had been deprived of property or a right to property. Defendants argue that the government elected from the beginning to proceed only on an intangible rights theory, and now it must suffer the consequences of its failure to proceed on a property rights theory. But, the government cannot be faulted for failing to foresee that the intangible rights theory would be reversed in *McNally*.

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[14] Although not required to do so, the Fifth Circuit and other circuits routinely address evidentiary sufficiency claims prior to retrial. *See Anderson*, 896 F.2d at 1077-78.

Faced with the same issue in *Davis*, the Sixth Circuit declined to review the evidence presented in the first trial to determine whether that evidence would support a conviction under a property rights theory. *Davis*, 873 F.2d at 907. Essentially, the court stated that the evidence presented in the first trial in support of an intangible rights conviction was irrelevant, because there never had been, and never could be, a valid indictment and conviction on an intangible rights theory. *Id.* Rather, the court viewed retrial as an "enlarged, fact-sensitive part of a single, continuous course of judicial proceedings" at which the government "certainly would not be foreclosed . . . from offering evidence that was not tendered at the first trial." *Id.* (quoting *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309, 104 S. Ct. 1805, 1813 (1984)). As the court stated:

> The proper time for determining the sufficiency on the "money or property" theory embodied in the new indictment in the case at bar will come when the government has rested its case in the "enlarged, fact-sensitive" part of the proceedings against Mr. Davis. And the proper court to make the sufficiency determination, in the first instance, will be the court that hears the evidence.

Davis, 873 F.2d at 907-08. Therefore, until the government has had an opportunity to prove a violation of the mail fraud statute on a valid property rights theory, a review of the sufficiency of the evidence is premature.

Finally, the conclusions reached here are consistent with the Fifth Circuit's statement at the end of its opinion in *Huls*: "Since reversal is based on defects in the indictment and jury instructions rather than on insufficiency of the evidence, there is no apparent obstacle to retrial, should the government seek a new indictment." *Huls*, 841 F.2d at 112. Thus, the government's decision to proceed only on an intangible rights theory does not preclude retrial on a property rights theory, and the evidence need not be reviewed to determine whether it would support a conviction on a property rights theory.

II. Failure to Charge a Crime

Both defendants filed motions to dismiss the indictment for failure to charge a crime. Alternatively, defendant Huls moved to strike all allegations of nondisclosure. Essentially, defendants argued that the indictment was fatally defective because it failed to allege any actual or intended economic harm suffered by the State. Magistrate Reidlinger agreed that the indictment alleged no harm to the State, but he denied defendants' motions, recommending instead that the government be required to specify the harm intended in a bill of particulars.

Defendants argue that because the indictment fails to identify any particular economic harm to the state, the second indictment alleges nothing more than the "good government" theory of mail fraud invalidated in *McNally*. Further, according to defendants, the indictment is so fatally defective that it cannot be cured by a bill of particulars. The government concedes that the indictment does not allege a financial loss as a result of defendants' scheme, but it objects to the finding that the second indictment alleges no harm to the state. Rather, the government contends that harm to the State is implicit in the scheme. Govt. Obj. at 4. The government states:

> (a) The property rights identified in the definition contained in Count 1, paragraphs 1 and 2 relate exclusively to the Terrebone Trough.
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> (b) The "harm" charged in this case is that intrinsic in the defendants' scheme to obtain and retain the State's property rights through false pretenses, representations, and promises.

Government's Supplemental Response to Defendants' Motion for a Bill of Particulars, at 1.

The Fifth Circuit set forth the elements of mail fraud in *United States v. Rico Industries, Inc.*, 854 F.2d 710, 712 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1529 (1989). In order to obtain a mail fraud conviction, the government must prove: (1) the

existence of a scheme to defraud that (2) involves the use of the mails for the purpose of executing the scheme, and (3) the specific intent to commit fraud. *Id.*, 854 F.2d at 712. In addition, the scheme to defraud must be aimed at the property rights of the victim. *Id.* (citing *McNally*, 107 S. Ct. at 2880-81). Under these standards, mail fraud convictions have been upheld for depriving the victim of information relevant to the victim's economic welfare,[15] or depriving the victim of its exclusive use of confidential business information[16] or its right to control how its money is spent.[17] Proof of actual or intended financial loss is not essential to a mail fraud conviction.[18]

In this case, the second indictment charges the defendants with participating in a scheme to obtain and retain,[19] by means of false pretenses, representations and promises, certain State rights incidental to the State's ownership of lands in the Terrebone Trough.[20] These rights include "the exclusive right to explore and develop [the State's] lands for the production of minerals and to reduce the minerals to possession and ownership and to lease these rights." Count 1, ¶ 2. The indictment alleges further that defendants executed the scheme by concealing Huls' financial ties to XCL and Miller from the Ethics Commission and the Mineral Board;[21] by concealing XCL's interest in bids

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[15] See *United States v. Rochester*, 898 F.2d 971, 976 (5th Cir. 1990) (citing *United States v. Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 697 (1988)); *see also United States v. Little*, 889 F.2d 1367, 1368-69 (5th Cir. 1989) (discussing 5th Circuit precedent) *cert. denied*, 110 S. Ct. 2176 (1990).

[16] See, *e.g.*, *Carpenter v. United States*, 108 S. Ct. 316, 320 (1987).

[17] See *United States v. Shyres*, 898 F.2d 647, 652-53 (8th Cir. 1990) (citing *McNally*, 107 S. Ct. at 2882; *Rico Industries*, 854 F.2d at 713-14); *United States v. Fagan*, 821 F.2d 1002, 1010-10 n.6 (5th Cir. 1987).

[18] See *Carpenter*, 108 S. Ct. at 321; *United States v. Judd*, 889 F.2d 1410, 1414 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1494 (1990).

[19] In his ruling on Defendants' Motion to Strike Prejudicial Surplusage, the Magistrate struck the language "and to retain those property rights" from all counts of the indictment. The government has appealed this ruling, and this appeal is discussed *infra* at 40-41. For purposes of this motion, however, I discuss the indictment in its original form.

[20] Count I, ¶¶ 1, 20, 21.

[21] Count 1, ¶¶ 22(p), (u).

submitted in the name of the Texas International Petroleum Co. ("TIPCO"); by endeavoring to influence the Mineral Board to award the Terrebone Trough leases to TIPCO;[22] and by endeavoring to influence the Mineral Board to release TIPCO from a requirement that TIPCO provide five $1,000,000 letters of credit as a condition of awarding the leases.[23] Finally, the indictment alleges that defendants used the mails in furtherance of the scheme.[24]

Both defendants assert that the indictment alleges no harm to the State independent of the deception itself. At most, defendants contend, the indictment alleges only a violation of the State Ethics Code. Because the Ethics Code does not impose criminal penalties, defendant Miller argues that a federal conviction for mail fraud violates fundamental principles of federalism.[25] Defendant Miller also asserts that the nondisclosures are material only to defendant Huls' failure to recuse himself—not to the essence of the agreement between the State and TIPCO.[26] Because both arguments depend upon whether the indictment sufficiently alleges harm to the state, I address that question first.

As the Magistrate recognized, a showing of actual or intended harm is a prerequisite to a mail fraud conviction.[27] Although the Magistrate found otherwise, I conclude that the scheme alleged here may constitute harm within the reach of the mail fraud statute.[28] The indictment alleges that defendants concealed information from the Ethics Commission and the Mineral Board to enable defendant Huls to participate in, and endeavor to influence, the Mineral Board's decisions with respect

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[22] Count I, ¶ 22(s).

[23] Count I, ¶ 22(t).

[24] Count I, ¶¶ 20, 22(v).

[25] *See* Defendant Miller's Memorandum in Support of Objections to Magistrate's Report on Defendant Miller's Motion to Dismiss for Failure to Charge a Crime at 15-18.

[26] *See* Defendant Miller's Failure to Charge a Crime Obj. at 13-15.

[27] *See Little*, 889 F.2d at 1368.

[28] *See* cases cited *supra* notes 15-17.

to the Terrebone Trough leases, thereby obtaining and retaining State property rights. To be sure, the harm is not alleged in a specific manner, but contrary to defendant Miller's assertion, the indictment alleges more than a mere violation of the State Ethics Code.

For this reason, the indictment violates no fundamental federalism principles. If, as defendants suggest, the indictment merely alleged a violation of the Ethics Code (which imposes no criminal penalty for such violations), the concerns expressed in *McNally* would probably require dismissal of the indictment. But because the government may be able to show a detriment to a property right identified in the indictment, *McNally*'s fundamental requirement is met. As the Supreme Court stated in *Carpenter*, "[s]ections 1341 and 1343 reach *any* scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Carpenter*, 108 S. Ct. at 321 (emphasis added). For the same reason, the materiality of the nondisclosures cannot be limited to defendant Huls' failure to recuse himself.

However, because the harm is not alleged in a specific manner, the government must specify, in a supplemental bill of particulars, the nature of the harm alleged. The government's attempt to clarify the harm suffered as "intrinsic" harm does not suffice. The term is so broad and ethereal that one cannot grasp the precise nature of the harm involved in this case. Further, every case cited by the government refers to a precise harm. In *United States v. Fagan*, 821 F.2d 1002 (5th Cir. 1987), *Rico Industries*, and *United States v. Richerson*, 833 F.2d 1147 (5th Cir. 1987), the property right interfered with was the right to all information relevant to the victim's economic welfare. The victim in each case suffered the loss of the right to this information—not some "intrinsic" or "implicit" loss. It may well be that the type of harm present in *Fagan*, *Rico Industries*, and *Richerson* is present in this case. Additionally, there may be other ways in which defendants interfered with the State's property rights.[29] If,

[29] For example, it may be that the State has a right to lease mineral rights to its lands in a manner free from inside influence or tampering, the loss of which may deprive the State of interested and available bidders.

however, the government cannot identify the nature of the harm in a satisfactory way, the only possible conclusion is that the indictment does not allege harm to State property rights. At any rate, the government cannot keep defendants (and the Court, for that matter) guessing as to the harm the government intends to prove at trial.

Defendant Miller contends that a fatally defective indictment cannot be cured with a bill of particulars.[30] This argument is premised upon the Magistrate's finding that the second indictment alleges no actual or intended harm to the State and contains no specific allegation that the information concealed was economically material. As discussed above, the indictment alleges harm sufficient to withstand defendants' motions to dismiss. Therefore, it is necessary to consider only the issue of materiality.

"The test of the validity of an indictment is 'not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards.' " *United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989) (citing *United States v. Webb*, 747 F.2d 278, 284 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1222 (1985)). The sixth amendment's requirement that a defendant "be informed of the nature and cause of an accusation" is satisfied when the defendant is fairly informed of what charge he must be prepared to meet and has sufficient facts to determine whether he may plead double jeopardy. *Wilson*, 884 F.2d at 179 n.8 (citing *United States v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986)). When an indictment informs the defendants of the elements of the charge and provides sufficient detail to enable the defendant to rely upon the indictment for a double jeopardy defense in the event of future prosecution, it satisfies the constitutional standards for a valid indictment. *United States v. Hernandez*, 891 F.2d 521, 525 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1935 (1990).

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[30] *See* Defendant Miller's Objections to Magistrate's Recommendations on Motion to Dismiss for Failure to Charge a Crime at 8-13.

In this case, the second indictment conforms to minimal constitutional standards. It tracks the language of the statute, and identifies the scheme and the acts in furtherance of the scheme. Materiality is neither mentioned in the mail fraud statute nor in the recently published 1990 Fifth Circuit Pattern Criminal Jury Instructions on mail fraud. Rather, the elements of the crime, for purposes of testing the validity of the indictment, are the elements set forth above: 1) a scheme to defraud aimed at the property rights of the victim; 2) specific intent; and 3) use of the mails. *See Laird v. Integrated Resources, Inc.*, 897 F.2d 826, 837 n.53 (5th Cir. 1990) (materiality is not an element of mail fraud) (citing cases).[31] Therefore, the indictment does not fail on this ground.

Both defendants note that the indictment inexplicably omits certain language contained in the mail fraud statute. The indictment alleges a scheme to obtain and retain certain State property rights by means of false pretenses, representations or promises, whereas the statute criminalizes "any scheme *or artifice to defraud*, or for obtaining money or property by means of false *or fraudulent* pretenses, representations or promises . . . ." 18 U.S.C. § 1341. Defendants point to the omission of any reference to the words "defraud" and "fraudulent." Defendant Miller contends that the government cannot thus eliminate its obligation to prove the elements of mail fraud. Defendant Huls goes further and argues that because the government limited itself to charging a scheme by means of false pretenses, and because false pretenses requires an affirmative misrepresentation, the government cannot rely upon nondisclosures to prove mail fraud.

The government responds that defendant Huls' argument is without support in the case law and that a representation which conceals a material fact may be false or fraudulent within the meaning of the mail fraud statute. The Magistrate, without

[31] At most, a jury finding of immateriality would mean that the State suffered no actual harm as a result of defendants' scheme. However, proof of success of the scheme is not essential to a mail fraud conviction, and therefore defendants may still be convicted of mail fraud if the jury finds that they had the requisite *intent* to obtain and retain State property rights by means of false pretenses, representations, or promises. *Laird*, 897 F.2d at 839.

entering into a detailed discussion of the arguments and authorities, ruled that the government should be required to prove all of the elements of mail fraud and that this proof need not be limited to false pretenses and representations as opposed to proof of nondisclosure of financial and other relationships. Report at 16-17.

In their objections, defendants raise the same arguments they presented to the Magistrate. Although some courts have ruled that a scheme to defraud and a scheme to obtain money or property by means of false or fraudulent pretenses, representations or promises are different offenses,[32] I find none which suggest that the use of "false" instead of "fraudulent" in the indictment to describe the manner of deceiving the victim precludes the government from introducing evidence of nondisclosures or concealment of information. In fact, the words appear to be used interchangeably.[33] Therefore, defendant Huls' argument does nothing more than point out a semantic distinction without a substantive difference.

Accordingly, as the Magistrate ruled, the indictment is not fatally defective, and a bill of particulars is the proper method of providing the defendants with the information necessary to defend themselves against the charges contained in the second indictment.

III. Prosecutorial Vindictiveness

Defendants filed a joint motion to dismiss Counts 3 and 4 of the second indictment for prosecutorial vindictiveness. These counts involve two mailings from R. Gray Sexton of the Ethics Commission, one to then-governor Edwin Edwards on June 4, 1984, and one to Ernest L. Edwards on July 9, 1984. The government alleges that these mailings are part of the scheme to deprive the State of its property rights. These counts were not alleged in the original indictment.

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[32] See, *e.g.*, *United States v. Cronic*, 900 F.2d 1511, 1513 (10th Cir. 1990).

[33] *See, e.g. United States v. Covino*, 837 F.2d 65, 70 (2d Cir. 1988) (jury instruction stated that concealing or failing to disclose information may be a false representation) (conviction reversed on other grounds).

At the time of sentencing, defendant Huls stood convicted of conspiracy and three substantive counts of mail fraud and defendant Miller stood convicted of conspiracy and two counts of mail fraud. Thus, the defendants were exposed to possible prison terms of 20 and 15 years, respectively. On June 5, 1987, Judge Polozola sentenced defendant Huls to 10 years in prison and defendant Miller to 8 years in prison.

The second indictment charges defendant Huls with conspiracy and five substantive counts of mail fraud. Defendant Miller is charged with conspiracy and four substantive counts of mail fraud. Defendants face maximum possible sentences of 30 and 25 years, respectively, on the second indictment.

Defendants argue that Counts 3 and 4 must be dismissed for three reasons. First, Counts 3 and 4 are based on the same activity alleged in the first indictment. Second, the government knew of these letters at the time of the first indictment and yet did not charge defendants with substantive mail fraud violations based upon these letters. Third, Counts 3 and 4 are similar to those counts on which defendants were acquitted in the first trial. In short, defendants assert that the government has no objective reason to charge defendants on Counts 3 and 4 "other than to punish the defendants for exercising their constitutional right to appeal." Defendants' Memorandum at 2.

The government responded by noting that defendants had alleged no actual vindictiveness and by suggesting that the determination of whether the defendants face increased penalties is more properly made by comparing the first indictment to the second indictment. If this standard were applied, defendants would have no basis for complaint, because the first indictment was potentially harsher than the second indictment.[34] Alternatively, the government argued that even if defendants had established a prima facie case of prosecutorial vindictiveness, the objective evidence indicated that the government was not motivated by a vindictive purpose.

[34] The first indictment charged both defendants with conspiracy and fourteen substantive counts of mail fraud. These charges exposed defendants to a maximum of 75 years in prison.

Magistrate Reidlinger concluded that defendants established a prima facie case of prosecutorial vindictiveness and the government failed to rebut the presumption of vindictiveness. Relying primarily on the arguments made before the Magistrate, the government objects to the Magistrate's findings. The government further objects on the ground that the Magistrate did not give the government an opportunity to present evidence on the question of vindictiveness.

In concluding that Counts 3 and 4 raise a presumption of vindictiveness, the Magistrate relied upon the standard enunciated in *United States v. Krezdorn*, 718 F.2d 1360, (5th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 1416 (1984). Report at 20-22. In *Krezdorn*, the Fifth Circuit held that a presumption of vindictiveness arises if a review of the entire proceedings "provides no objective indication that would allay a reasonable defendant that the more serious charge was vindictive." 718 F.2d at 1365. This presumption can be overcome if "the government proves by a preponderance of the evidence that events occurring since the time of the original charge decision altered that initial exercise of the prosecutor's decision." *Id.*[35]

The government initially contends that the penalties contained in the second indictment should be measured against the penalties contained in the first indictment. Govt. Obj. at 13. In *Krezdorn*, the court did not do this. Rather, the court compared the possible penalties in the second indictment to the sentence originally imposed. As the government notes, the court did not explain why it compared the penalties in this way. The omission is curious, because in three cases prior to *Krezdorn*, cases in which the court considered prosecutorial vindictiveness at length, the court's analysis focused upon a comparison of the two indictments.[36] Although the court did not explain the

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[35] *See also United States v. Molina-Iguado*, 894 F.2d 1452, 1453-54 (5th Cir. 1990) (following *Krezdorn*), *petition for cert. filed*, No. 89-7576 (U.S. May 16, 1990).

[36] *See Miracle v. Estelle*, 592 F.2d 1269, 1275-76 (5th Cir. 1979); *Jackson v. Walker*, 585 F.2d 139, 147 (5th Cir. 1978); *Hardwick v. Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977) (Tuttle, J.), *cert. denied*, 98 S. Ct. 897 (1978).

rationale for this comparison in two of these cases, the court explicitly discussed the issue in *Miracle v. Estelle*, 592 F.2d 1269, 1275-76 (5th Cir. 1979), stating: "the severity of an alleged offense is not determined by the actual punishment imposed but by the potential punishment for the offense, viewed prospectively."

In *Krezdorn*, however, the court rejected the notion of placing strict guidelines on determinations of prosecutorial vindictiveness:

> The judicial history of decisions involving judicial and prosecutorial vindictiveness is now clear enough to teach that it is a mistake to measure cases in this area against fixed gauges. The proper solution is not to be found by classifying prosecutorial decisions as changing or adding charges, as amending decisions already made, as covering the same basic conduct or spree of activity, or as being made pre-or post-trial. Nor is it determinative whether the procedural matrix is appeal and error or trial de novo. It is also unnecessary to seek to strike the delicate balance between the rights of defendant and prosecutor. The surer solution lies in applying a more familiar, less exact test.

Id., 718 F.2d at 1365.

In this light, I find that the Magistrate applied *Krezdorn* properly. As the *Krezdorn* court did, the Magistrate compared the charges and penalties in the second indictment to the charges and penalties—actual and potential—the defendants faced upon conviction and determined that the government exposed defendants to increased potential terms of imprisonment in the second indictment. Report at 22. He then undertook a careful review of the entire proceeding and concluded that, judging from the perspective of a reasonable defendant, no objective reason existed to support the additional counts. *Id.* at 23.

I agree with both conclusions. The scheme alleged in the second indictment is the same as that alleged in the first indictment. The government knew about these mailings in the

first trial. In fact, the letters that form the basis of Counts 3 and 4 were placed in evidence at the first trial. *See* Report at 23. Finally, it is impossible to ignore the fact that the letters that form the bases of Counts 3 and 4 are *responses* to a letter which formed the basis of Count 4 of the original indictment—a count on which both defendants were *acquitted*. Therefore, defendants have established a presumption of prosecutorial vindictiveness.

The Magistrate then concluded that the government failed to rebut the presumption. The government argued then, and argues now, that the government has the discretion to determine what mailings will be used as substantive counts in order to highlight certain events significant in accomplishing the scheme. The government further contends that these counts are necessary because the other mailings used to highlight these events "are not available for charging in the retrial of this case." Govt. Obj. at 17. This is so because defendants were *acquitted* on the substantive counts involving the other mailings in the first trial.

As the government notes, almost any rational reason will overcome a presumption of vindictiveness. *See Krezdorn*, 718 F.2d at 1365; *Hardwick*, 558 F.2d at 301. In this case, however, none of the illustrative reasons given in *Krezdorn* and *Hardwick* apply. No new evidence was discovered after the first indictment was filed, nor was the alleged crime incomplete. The same prosecutors are prosecuting this case.

Prosecutorial discretion plays an important role in our system of criminal justice, but here the government has abused that discretion. While the government is certainly entitled, in an ordinary mail fraud case, to use certain mailings to highlight certain critical events, such highlighting is highly suspect when the new counts are substantially similar to counts on which they were acquitted in the first trial. Further, the government has already used these same mailings to "tell the story" on the conspiracy count.[37] Under the circumstances presented in this

[37] This conclusion does not necessarily mean that the government will be precluded from introducing evidence of these mailings at trial, for reasons explained *infra* at 38-39.

case, I find that Counts 3 and 4 are overkill, and the government's explanation is insufficient to overcome the presumption of vindictiveness.[38]

IV. Collateral Estoppel

Both defendants filed motions to dismiss on collateral estoppel grounds. Defendants argue that the government may not relitigate the issue of whether a sale of XCL stock from Huls to Miller was a sham. In addition, defendant Miller contends that charges based upon his activities in connection with the Ethics Commission may not be raised in a second trial.

At the first trial, the government argued that in order to foreclose Ethics Commission inquiries into Huls' ties to XCL, defendants arranged a sham sale of Huls' XCL stock to Miller. Miller entered into a consulting agreement with TIPCO, and the payments Miller received from TIPCO were transferred to Huls to make the interest payments on Huls' XCL stock. This arrangement created the appearance that Huls had eliminated his interests in XCL, which in turn persuaded the Ethics Commission that Huls need not be disqualified from Mineral Board decisions involving XCL.

The first indictment was structured as follows: Count 1 charged defendants with conspiracy and Counts 2-15 charged defendants with fourteen substantive counts of mail fraud. Of the fourteen substantive counts, Counts 2 and 4 involved letters to the Ethics Commission regarding defendant Huls' ownership and sale of XCL stock; Count 6 involved a letter from the DNR to TIPCO's counsel awarding the Terrebone Trough leases to TIPCO; Count 7 involved a bill sent to TIPCO by defendant Miller for consulting services performed for TIPCO; and Counts 3, 5, and 8-15 involved checks written to defendant Huls in payment for the interest on Huls' XCL stock.

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[38] I find no need for an evidentiary hearing on this issue. The government has raised no new arguments, nor has it suggested any new evidence which might necessitate such a hearing. The issue is not credibility. The fact is that the government has failed to provide a rational explanation sufficient to overcome the presumption of prosecutorial vindictiveness.

Both defendants were acquitted of all charges concerning the payments for Huls' XCL stock (Counts 3-5 and 8-15 of the original indictment). Defendant Miller was acquitted of the charges based upon the letters to the Ethics Commission (Counts 2 and 4), but defendant Huls was convicted on Count 2 and acquitted on Count 4. Both defendants were convicted of the charges involving the award of the leases to TIPCO and Miller's consulting agreement with TIPCO.

Based upon the verdict, defendants argued that the jury necessarily found that the stock sale was legitimate, and therefore certain portions of the second indictment must be stricken.[39] In addition, defendant Miller argued that his acquittal on Counts 2 and 4—the only counts involving the Ethics Commission—means that the jury necessarily found that his activities relating to the Ethics Commission were not part of the scheme to defraud, and therefore all allegations tying Miller to the Ethics Commission must be stricken.[40] Both defendants contended that such alterations in the indictment require dismissal of the indictment, because the indictment would no longer charge a crime charged by the grand jury.

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[39] Specifically, defendants argued that Count 1, ¶ 22(i), (j), (p); Count 1, ¶ 23(d), (f), (g), (j)-(n); and Counts 3 and 4 must be stricken from the second indictment. The objectionable portions of Count 1 ¶ 22 alleged a sham sale of XCL stock from Huls to Miller (¶ 22(i)), a consulting agreement between Miller and TIPCO which provided funds to Miller to pay for Huls' XCL stock (¶ 22(j)), and a representation to the Ethics Commission that Huls had divested himself of XCL stock in order to permit Huls to participate in Mineral Board transactions affecting XCL and conceal material information from the Ethics Commission (¶ 22(p)). The objectionable portions of Count ¶ 23 involve the interest payments for Huls' XCL stock. Counts 3 and 4 involve two letters from the Ethics Commission—one to Governor Edwin Edwards notifying Governor Edwards of Huls' plan to sell stock and one to Ernest L. Edwards acknowledging receipt of Edwards' letter informing the Commission that Huls had sold his XCL stock.

[40] Defendant Miller urged that Count 1, ¶¶ 7, 8 and 22(b)-(d), (f), (g), (l)-(n), and (p) be stricken. Paragraph 7 discusses the Ethics Commission and its responsibilities concerning the conduct of public officials. Paragraph 8 quotes at length from the Ethics Code. The objectionable portions of ¶ 22 involve Huls' various interests in XCL which defendants allegedly failed to disclose to the Ethics Commission.

In response to defendants' motions, the government contended that the jury did not necessarily find the stock sale legitimate. In support of its argument, the government set forth all the evidence which indicated that the stock sale was a sham. In addition, the government argued that the convictions on Counts 1 and 7 (conspiracy and TIPCO consulting agreement) preclude a conclusion that the jury necessarily found the stock sale legitimate. The government reasoned that because the payments to Huls were included as overt acts in the conspiracy count, and because the TIPCO consulting agreement was presented to the jury *only* as part of the sham stock sale, the verdict is inconsistent and therefore provides no basis for defendants' contentions. In the alternative, the government argued that even if the jury did find the stock sale legitimate, Counts 3 and 4 should not be dismissed because the mailings "were part and parcel of the wide-ranging scheme to hide all of Huls' financial ties to Miller an XCL, including many separate from and independent of the stock." Government Memorandum in Opposition at 14. The government did not specifically address defendant Miller's argument.

After reviewing the indictment, the testimony, the jury charge, and the verdict, Magistrate Reidlinger concluded that the jury rejected the government's evidence and found the stock sale legitimate. Report at 28-29. Explaining the inconsistencies in the verdict raised by the government, the Magistrate pointed out: 1) the conspiracy count included allegations of other financial ties that may have been the basis for the convictions; and 2) the jury could have found the TIPCO consulting agreement an "entirely legitimate but nevertheless a financial arrangement which should have been disclosed by the defendants." Report at 29. However, the Magistrate did not conclude that the entire indictment need be dismissed. Rather, the Magistrate recommended that those portions of Count 1, ¶ 22(i), (j), and (p) of the second indictment which allege the sham stock sale should be stricken. With respect to Counts 3 and 4, the Magistrate reasoned that the jury's finding on the stock sale does not preclude the government from "attempting to prove that concealing the financial arrangements between Huls, Miller, and TIPCO, even though legitimate,

constituted part of the scheme in violation of 18 U.S.C. § 1341. The Magistrate did not make a recommendation on the allegations concerning the payments to Huls, nor did he discuss the aspects of collateral estoppel applicable only to defendant Miller.

Both defendants and the government objected to the Magistrate's recommendations. Defendants argue that because Counts 3 and 4 of the second indictment were mailings in furtherance of the stock sale, and because the jury found that the stock sale was not in furtherance of the scheme, Counts 3 and 4 and those portions of Count 1 that allege the payments to Huls as overt acts in furtherance of the conspiracy must be dismissed. Defendant Miller reiterates the collateral estoppel argument which applies solely to him. The government objects to every aspect of the Report arguably adverse to the government's position.

The doctrine of collateral estoppel stems from the fifth amendment's protection against double jeopardy. *Dowling v. United States*, 110 S. Ct. 668, 671 (1990) (citing *Ashe v. Swenson*, 90 S. Ct. 1189 (1970)). The doctrine provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Dowling*, 100 S. Ct. at 672 (quoting *Ashe*, 90 S. Ct. at 1194). To meet his burden of showing that collateral estoppel applies, the defendant "must demonstrate that an issue was necessarily decided in his favor in the first trial, and that the government is attempting to relitigate the issue in the second proceeding." *United States v. Coldwell*, 898 F.2d 1005, 1009 (5th Cir. 1990).

In determining whether collateral estoppel applies, the judge is obligated to examine the allegations of the indictment, testimony, the court's jury instructions and the jury's verdict to consider what makes the jury's verdict coherent. *United States v. Deerman*, 837 F.2d 684, 690 (5th Cir. 1988) (citations omitted), *cert. denied*, 109 S. Ct. 146 (1989). This determination should be made in a realistic, rational, and practical way, keeping in mind

all the circumstances. *Id.*, 837 F.2d at 690 (citation omitted). The fact that a verdict may not be wholly consistent internally does not preclude the application of collateral estoppel. *See United States v. Mespoulade*, 597 F.2d 329, 333 n.7, 336-37 (2d Cir. 1979) (Kaufman, J.).

As the Magistrate notes, defendants do not contest that the mailings occurred or that they caused the mailings. Report at 27-28. Therefore, the *only* issue before the jury was whether the stock sale constituted part of the scheme to defraud. Upon review of the first indictment, the testimony, the court's jury instructions, the verdict, the Magistrate's Report, and the arguments of counsel, I conclude that, if nothing else, the jury determined unequivocally that the stock sale was legitimate.

The arguments presented by the government do not persuade me otherwise. The government contends that "the presence of *any* other rational possibility precludes the application of collateral estoppel." Government's Objections at 26. For the first time, the government argues that one explanation for the acquittals on counts 3-5 and 8-15 of the original indictment is that the jury may have concluded that at the time of these mailings, the scheme was already complete, and therefore the mailings were not in furtherance of the scheme to defraud. Government's Objections at 26. This may be a rational explanation, but it is not a reasonable explanation. The verdict must be evaluated in light of the circumstances in which it was rendered. *See United States v. Leach*, 632 F.2d 1337, 1340 (5th Cir. Unit A 1980). In this case, neither the government nor the defendants presented this explanation to the jury at the first trial. Therefore, the record does not support the government's explanation.

Further, the government's argument concerning the government's perceived inconsistency between the conviction on Count 7 of the original indictment (TIPCO consulting agreement) and the acquittals on the other counts hinges upon the conclusion that the government presented the consulting agreement to the jury *only* as a means of legitimizing the stock

sale. According to the government, a guilty verdict on the consulting agreement necessarily means that the stock sale was a sham. However, both the Magistrate and the defendants have presented reasonable explanations for the opposite conclusion.

Based on a review of the evidence, the Magistrate concluded that the jury could have found that the consulting agreement was legitimate, but the defendants should have disclosed the agreement nonetheless. The government objects that the first indictment alleged only a scheme to allow Huls to conceal his interest in XCL; it did not allege that an undisclosed interest in TIPCO was part of the scheme. *See* Government's Objections at 28-29. This argument ignores TIPCO's essential role in the scheme. The first indictment alleges that one of the purposes of the scheme was to "allow Huls to serve on the Mineral Board and perform official acts in transactions which were beneficial to XCL *and TIPCO* despite his having substantial economic and financial interests in XCL at the time. Original Indictment Count 1, ¶ 18(d) (emphasis added). Further, absent the concealment of XCL's interest in TIPCO's Terrebone Trough bids, there was no reason for defendants to conceal Huls' interest in XCL, because the indictment alleges no other Mineral Board decision involving Huls, XCL, Miller, or TIPCO. Therefore, the jury might reasonably have concluded that the consulting agreement should have been disclosed by virtue of XCL's interest in TIPCO's leases.

Another possibility, suggested by defendants, is that the jury may have viewed the consulting agreement as a sham independent of the stock sale. *See* Defendants' Response to Government's Objections at 7-8 (citing Trial transcript). Alternatively, the jury may have viewed the consulting agreement as a means of rewarding Huls for influencing the Mineral Board to award the leases to TIPCO. *See* Defendants' Response to Government's Objections at 9. I view this explanation as the more plausible explanation, especially in light of the fact that the original indictment alleges that defendants concealed XCL's interest in TIPCO's bid. However, all of these explanations are supported by the record, and they provide a far more coherent

interpretation of the jury's verdict than that offered by the government. In this light, I find, contrary to the government's position and consistent with the conclusions of the Magistrate and the Fifth Circuit,[41] that the jury concluded that the stock sale was not a sham.

Because the jury determined that the stock sale was not in furtherance of the scheme to defraud, the references to the sham nature of the stock sale in Count 1, ¶ 22(i), (j), and (p) of the second indictment must be stricken. The Magistrate did not rule on the allegations concerning the payments to defendant Huls contained in Count 1, ¶ 23(d), (f), (g), (j)-(n) of the second indictment, but these allegations formed the bases for substantive counts in the original indictment on which both defendants were acquitted.[42] Therefore, these allegations cannot be used as overt acts in support of the conspiracy count. *See United States v. Mock*, 604 F.2d 341, 344 (5th Cir. 1979) (citing *Yawn v. United States*, 244 F.2d 235, 237 (5th Cir. 1957).

However, the fact that the stock sale was not part of the scheme to defraud does not preclude the government from charging defendants with the failure to disclose information to the Ethics Commission and the Mineral Board based upon mailings related to the stock sale. This is so because if the stock sale was legitimate, Huls' conviction on Count 2 of the original indictment (letter advising Ethics Commission of Huls' stock interests in XCL and requesting an advisory opinion) can only be interpreted as a finding that Huls failed to disclose his interests in XCL to the Ethics Commission. Further, the new indictment

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[41] The Fifth Circuit stated: "After a three-week trial, the jury found that Huls' sale of his XCL stock had not been a sham." *Huls*, 841 F.2d at 110. Although this statement is not essential to the court's holding, I find it instructive that the court denied the government's request for rehearing on this point.

[42] These allegations involve checks written to defendant Huls in payment for his XCL stock. Although the language used in the substantive counts of the first indictment differs from the language of the second indictment and the dates are not the same, defendant Huls asserts, without contest from the government, that the substance of the allegations in both indictments is the same. *See* Defendant Huls' Objections at 12.

alleges not only a failure to disclose Huls' financial ties to XCL, but also a failure to disclose Huls' financial ties to Miller. Therefore, Counts 3 and 4 of the second indictment need not be dismissed on collateral estoppel grounds.

Nor does collateral estoppel require dismissal of the allegations objected to only by defendant Miller. I find it curious that the government has not specifically addressed the issue in its opposition memorandum, oral argument, objections to the Magistrate's Report, and response to defendants' objections, but even so, I am unpersuaded that the jury necessarily found that Miller's dealings with the Ethics Commission were not part of the scheme to defraud. As discussed above, one reasonable explanation for Miller's conviction on Count 7 of the original indictment is that the consulting agreement should have been disclosed. And in view of the financial relationships between Huls, Miller, XCL and TIPCO alleged in counts on which defendants were convicted, the jury's refusal to convict Miller on two mailings relating to the stock sale between Huls and Miller can hardly be interpreted as necessarily finding that Miller's activities with respect to the Ethics Commission were not part of the scheme to defraud.

V. Nondispositive Motions

The parties appealed from certain nondispositive rulings issued by the Magistrate. In particular, the government appealed the Magistrate's rulings on Defendants' Joint Motion to Strike Prejudicial Surplusage and Defendants' Joint Motion for a Bill of Particulars. Defendants appealed the Magistrate's Rulings on Defendants' Joint Motion to Disclose Exculpatory Information and Defendants' Joint Motion for Production of Documents Material to Preparation of the Defense. I review these objections under the clearly erroneous standard. *See* 28 U.S.C. § 636(b)(1)(A).

A. Prejudicial Surplusage

Among other things, defendants moved to strike the numerous references in the second indictment to the Ethics Code.

The Magistrate granted this motion in part, striking: 1) portions of Count 1, ¶ 5; 2) Count 1, ¶ 8 in its entirety; and 3) the language "and to retain those property rights" from Count 1, ¶ 20, 21, and 22(v) and Counts 2 through 6. The government objects to the Magistrate's ruling in its entirety.

The Magistrate ruled that the inclusion of portions of the Ethics Code in the second indictment creates unacceptable risks of confusion on the part of the jury and prejudice against the defendants. Magistrate's Ruling at 4. The government contends that the indictment alleges the obtaining of State property rights through Huls' breaches of the fiduciary duties imposed upon him by the Ethics Code, and that the inclusion of the stricken portions is essential to an understanding of the nature of these fiduciary duties.

The government's arguments do not persuade me that the Magistrate's ruling is clearly erroneous. As defendants point out, the government appears to confuse the question of admissibility at trial with whether the allegations constitute surplusage in the indictment. Defendants Opposition to Government's Appeal at 4. The Ethics Code may be relevant to an understanding of the nature of the crime asserted here, but there is no doubt that the stricken portions are neither elements of the crime of mail fraud nor essential to this particular indictment. Further, I note that the first indictment managed to charge a crime without reference to the Ethics Code.

The Magistrate struck the language "and to retain those property rights" on the ground that the mail fraud statute does not include such language, and therefore the indictment criminalizes conduct which the statute does not comprehend. The government submits that this language is consistent with the government's theory that the State has been deprived of its right to control its property, and "each unlawful effort to thwart the State from regaining control of its property is tantamount to an unlawful obtaining of its property again." Government's Objections at 40.

Frankly, I fail to see why the government contests this point so vigorously. As defendants point out: "If 'retain' means

'obtain,' then the word 'retain' is clearly surplusage . . . . On the other hand, if 'retain' means something different from 'obtain,' then the word 'retain' is being used to charge something not within the scope of the mail fraud statute." Defendants' Opposition to Government's Appeal at 6. If the government wishes to assert a "control" theory of mail fraud, it must do so within the terms of the statute.

B. Bill of Particulars

The Magistrate ruled that the government must identify the temporal scope of the alleged conspiracy. The government points to Count 1, ¶ 20, which alleges: From in or about November, 1983, through in or about June, 1985 . . . "I find that this constitutes a sufficient allegation of the temporal scope of the conspiracy.

C. Exculpatory Information

Defendants object to the Magistrate's denial of their motion to compel the disclosure of exculpatory information with respect to categories 5, 6, 7, 8, 9, and 11. Requests 5 and 6 seek information tending to establish that members or employees of the Mineral Board and Ethics Commission knew about defendant Huls' financial connections to XCL and defendant Miller. Requests 7, 8, and 9 seek information tending to establish that anyone other than defendant Huls recommended awarding the Terrebone Trough leases to TIPCO and exonerating TIPCO from the letter of credit requirement. Request 11 seeks information concerning any bids submitted to the Mineral Board without disclosure of an anticipated ownership interest in the lease.

Initially, the Magistrate noted that *Brady v. Maryland*, 83 S. Ct. 1194 (1963) requires the government to disclose information favorable to the defense and material to either his guilt or punishment. However, the Magistrate also noted that the information sought applies only to trial witnesses, and that the government acknowledged its obligation under *Brady*. In this context, the Magistrate denied requests 5 and 6 only to the extent the information sought was beyond the scope of the indictment.

He did not discuss request 8, but the government did not object to request 8. The Magistrate denied requests 7, 9, and 11, on the ground that the information sought was not exculpatory. Therefore, although defendants object to the rulings on all the categories listed above, it seems that their only complaint lies with the Magistrate's rulings on categories 7, 9, and 11.

The mere fact that other members of the Mineral Board recommended or favored the award of the leases to TIPCO and acceptance of evidence of TIPCO's financial creditability rather than letters of credit (categories 7 and 9) is of no consequence. The indictment alleges a scheme to obtain property rights of the state by concealing Huls' financial ties to Miller and XCL and by *influencing* the Mineral Board's decision. Obviously, other members of the Mineral Board must have supported the award of the leases and the release of the letters of credit; Huls did not act alone. But the fact that other members supported the award of the leases to TIPCO does not mean that defendants did not act pursuant to their scheme in violation of the mail fraud statute. Further, general information regarding the submission of bids to the Mineral Board without disclosure of an anticipated ownership interest (category 11) is non-exculpatory, because this case involves a bid in which the interest of a Board member was not disclosed.

Finally, defendants suggest that the government cannot be relied upon to produce such material because the government failed to produce certain *Brady* materials in the first trial. Apart from the conclusory nature of this objection, there is no indication that *Brady* materials will not be exchanged sufficiently in advance of trial.

D. Production of Documents

Defendants sought to compel the government to produce 18 specified categories of documents material to the defense for inspection and copying pursuant to Fed. R. Crim. P. 16(a)(1)(C). The government argued that it had complied with Rule 16 and that defendants' request is overly broad and irrelevant. Further,

the government pointed out that because defendants have already been tried once on the same facts, defendants should be required to be far more specific in their request.

The Magistrate denied defendants' motion on the ground that "the requests were not sufficiently specific to enable the court to evaluate the materiality of the documents sought." Magistrate's Ruling at 18. Defendants contend that they made a *prima facie* showing of materiality sufficient to justify production and that the Magistrate failed to apply the proper standard of materiality.

Federal Rule of Criminal Procedure 16(a)(1)(C) provides, in relevant part:

> Upon request of the defendant the government shall permit the defendant to inspect and copy . . . documents . . . which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

In determining the standard for materiality, the Magistrate relied upon *United States v. Ross*, 511 F.2d 757, 763 (5th Cir.), *cert. denied*, 96 S. Ct. 62 (1975), in which the court stated: "There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor." *See also United States v. Reeves*, 892 F.2d 1223, 1226 (5th Cir. 1990). Defendants contend that this standard "is the test applied by a court of appeals, not by a trial court in determining whether to order disclosure." Defendants' Appeal at 4. According to defendants, the documents should be produced if they "will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony or assisting impeachment and rebuttal." *United States v. Secord*, 726 F. Supp. 845, 846 (D.D.C. 1989) (quoting *United States v. Felt*, 491 F. Supp. 179, 186 (D.D.C. 1979). However, Rule 16 does not permit defendants to engage in a "fishing expedition." *See United States v. Wilson*, 571 F. Supp. 1422, 1424 (S.D.N.Y. 1983) (Weinfeld, J.).

Upon review of defendants' requests for production, I find that the documents requested are material, but that the requests are overly broad. Accordingly, the government will be required to produce all *material* documents requested by defendants in the government's possession to the extent the government has not already produced such documents.

VI. Speedy Trial

On March 13, 1990, the government filed, but did not notice, a motion to extend the time within which the trial must commence. The government suggests that a new speedy trial calendar be set from the initial appearance of the defendants. In *United States v. Mize*, 820 F.2d 118 (5th Cir.) (Wisdom, J.), *cert. denied*, 108 S. Ct. 328 (1987), the Fifth Circuit held that after a defendant obtains the reversal of his conviction, a new seventy-day period begins at the time the second indictment is filed. Accordingly, the government's motion to extend the time within which the trial must commence will be DENIED.

Accordingly,

IT IS ORDERED that the Magistrate's recommendations on defendants' double jeopardy, failure to charge a crime, and prosecutorial vindictiveness motions are ADOPTED, and the objections filed by defendants and the government are OVERRULED.

IT IS FURTHER ORDERED that the government identify, by July 31, 1990, the nature of the harm to the State's property rights.

IT IS FURTHER ORDERED that the Magistrate's recommendations on defendants' collateral estoppel motions are ADOPTED as modified, defendants' objections are GRANTED IN PART, and the government's objections are OVERRULED. In addition to the language of the second indictment that the Magistrate recommended be stricken, the language in Count 1 ¶ 23(d), (f), (g), and (j)-(n) is stricken.

IT IS FURTHER ORDERED that the government's appeal of the Magistrate's Ruling on defendants' Joint Motion to Strike Prejudicial Surplusage is DENIED.

IT IS FURTHER ORDERED that the government's appeal of the Magistrate's ruling on defendants' Joint Motion for a Bill of Particulars is GRANTED.

IT IS FURTHER ORDERED that defendants' appeal of the Magistrate's Ruling on defendants' Joint Motion to Compel the Disclosure of Exculpatory Information is DENIED.

IT IS FURTHER ORDERED that defendants' appeal of the Magistrate's ruling on defendants' Joint Motion for Production of Documents Material to the Defense is GRANTED. The government shall produce all *material* documents requested by defendants in the government's possession to the extent the government has not already produced such documents.

IT IS FURTHER ORDERED that the government's motion to extend the time within which trial must commence is DENIED.

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

APPENDIX C

No. 90-3512

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

VERSUS

MARSDEN W. MILLER, JR.,
and WILLIAM C. HULS,

Defendants-Appellants
Cross-Appellees.

Appeals From the
United States District Court
for the Middle District of Louisiana

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 01/23/92, 5 Cir., 1992, 952 F.2d 866)
(February 24, 1992)

Before BROWN, KING, and GARWOOD, Circuit Judges.

PER CURIAN:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ WILL GARWOOD

United States Circuit Judge

APPENDIX D

No. 90-3512

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.C. DOCKET NO. CA 86 92 B

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Cross-Appellant,

VERSUS

MARSDEN W. MILLER, JR.,
Defendant-Appellant
Cross-Appellee.

Appeals from the
United States District Court
for the Middle District of Louisiana

Before BROWN, KING, and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part with respect to the appeals of Miller and Huls; their appeals are dismissed in part for lack of jurisdiction; the government's cross-appeal is dismissed.

January 23, 1992

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

GILBERT F. GANUCHEAU
CLERK
OFFICE OF THE CLERK
600 CAMP STREET
NEW ORLEANS, LA 70130

March 6, 1992

No. 90-3512—USA vs. MILLER & HULS

MANDATE STAYED TO AND
INCLUDING *APRIL 13, 1992*

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should *not* be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ DELLA J. FRANKLIN
Deputy Clerk

(2)

No. 91-1617

Supreme Court, U.S.
FILED
JUN 10 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM C. HULS AND MARSDEN W. MILLER, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

ROBERT S. MUELLER, III
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QUESTIONS PRESENTED

1. Whether, after petitioners' mail fraud convictions were reversed under *McNally* v. *United States*, 483 U.S. 350 (1987), and a new indictment charging a valid theory was returned, the court of appeals should have determined whether the evidence at petitioners' first trial was sufficient under the theory charged in the second indictment.

2. Whether, because the government initially indicted and tried petitioners on mail fraud charges resting on the invalid "intangible rights" theory, the Double Jeopardy Clause bars petitioners' trial on a new indictment charging them under the valid "deprivation of property" theory.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1617

WILLIAM C. HULS AND MARSDEN W. MILLER, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 952 F.2d 866. The opinion of the district court (Pet. App. 17a-52a) is not reported. A prior opinion of the court of appeals in this case is reported at 841 F.2d 109.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1992. A petition for rehearing was denied on February 24, 1992. Pet. App. 53a. The petition for a writ of certiorari was filed on April 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners were the founders and principal owners of the Exploration Company of Louisiana (XCL), an oil and gas exploration business. In 1984, petitioner Huls became Secretary of the Louisiana Department of Natural Resources. Two years later, petitioners were indicted by a federal grand jury sitting in the Middle District of Louisiana. The indictment charged them with 15 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. The indictment alleged that petitioners conspired to allow Huls to maintain a substantial economic interest in XCL, while hiding that interest because Huls performed official acts that were beneficial to XCL. The conspiracy count charged that petitioners' actions defrauded the citizens of the State of Louisiana of their right to the honest and faithful services of Huls, and of their right to have various state governmental entities administered honestly, fairly, and free from corruption. The substantive counts alleged specific acts in furtherance of the scheme. Pet. App. 17a-18a.

Both petitioners were convicted on the conspiracy count and on two of the substantive counts; Huls was convicted on a third substantive count as well. The jury acquitted them on the remaining counts. The court of appeals reversed their convictions because the case was tried on the intangible rights theory that was disapproved in *McNally* v. *United States*, 483 U.S. 350 (1987). See Pet. App. 18a.

2. Petitioners were then reindicted on six counts—five of mail fraud and one of conspiracy. This time the indictment alleged that petitioners conspired to "obtain property rights of the State and to retain those

property rights" by false pretenses, representations, and promises. Pet. App. 18a. Petitioners moved to dismiss the second indictment on double jeopardy and collateral estoppel grounds. The district court denied those motions because petitioners were not exposed to a "property rights" theory of mail fraud liability at their first trial. *Id.* at 17a-34a, 39a-46a.[1]

3. Petitioners took an interlocutory appeal in which they renewed their arguments and additionally claimed that this Court's ruling in *Grady* v. *Corbin*, 495 U.S. 508 (1990), barred the government from presenting in the second indictment a theory that it could have presented in the first indictment, but did not. The court of appeals affirmed. Pet. App. 1a-16a. Citing an unbroken line of precedent, the court pointed out that the Double Jeopardy Clause does not forbid retrial of a defendant whose conviction is reversed because of an error in the proceedings. *Id.* at 5a-6a. The court pointed out that petitioners' convictions had been reversed because of defects in the indictment and the jury instructions, so there was nothing to prevent petitioners' retrial on a new indictment. *Id.* at 6a-7a.

The court of appeals also declined to reach petitioners' claims that there was insufficient evidence at their first trial to support the second indictment's deprivation of property rights theory. Relying on *Richardson* v. *United States*, 468 U.S. 317 (1984),

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[1] The district court dismissed two substantive counts that were not part of the original indictment on the ground that they were the result of vindictive prosecution. The district court also struck certain allegations from the conspiracy count. Pet. App. 4a, 34a-39a. The government appealed the latter ruling, but not the ruling dismissing the two substantive counts. The court of appeals dismissed the government's appeal. Those rulings are not at issue here.

the court held that because petitioners' convictions had been reversed, jeopardy had not terminated, so petitioners were not entitled to a review of the sufficiency of the proof at their first trial. Pet. App. 8a-12a.[2]

ARGUMENT

1. Petitioners first contend, Pet. 7-10, that the court of appeals should have assessed the sufficiency of the evidence at their first trial under the theory charged in petitioners' second indictment. That contention is unsound. Because only the intangible rights theory was charged in the first indictment, the evidence presented at trial necessarily bore only on the intangible rights theory. It would be pointless to ask whether the evidence would have supported a conviction under the deprivation of property theory, because the case was not tried on that theory. It would be entirely fortuitous if the evidence offered in support of a charged theory also happened to support a theory that was not charged, and it is hard to imagine any interest protected by the Double Jeopardy Clause that should turn on whether the evidence at the first trial might have been sufficient to support a conviction on a theory that was not charged in that case.[3] At the

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[2] The court of appeals also dismissed petitioners' challenge to the validity of the indictment; the court held that it did not have jurisdiction to determine that issue on interlocutory appeal. Petitioners have not pressed that point here.

[3] A simple example may illustrate this point. Suppose the government charged the defendant with murder of a federal agent, and identified that agent as A. Suppose further that the court of appeals reversed the conviction on the ground that A was not a federal agent at the time of the murder, but that B, who accompanied A and was also murdered, was the one who was a federal agent. Surely, the permissibility of

second trial, the government will be obliged to present evidence sufficient to satisfy the deprivation of money or property rights theory; that presentation may include evidence that was not introduced at the first trial. *United States* v. *Davis*, 873 F.2d 900, 907 (6th Cir.), cert. denied, 493 U.S. 923 (1989). Should the government fail to meet its burden of proof, petitioners will be entitled to an acquittal. But they are not now entitled to a review of the sufficiency of the evidence presented at petitioners' trial on the intangible rights theory and a determination whether it was sufficient to support convictions on a different theory of criminal liability.

No decision of this Court has addressed the precise question presented by petitioners. However, in *Richardson* v. *United States*, *supra*, the Court held that when a prosecution ends in a mistrial because of a hung jury, a defendant is not entitled to a review of the sufficiency of the evidence before he is retried. The Court rejected the contention that the reasoning of *Burks* v. *United States*, 437 U.S. 1 (1978), requires that type of review. The Court explained that *Burks* held only that "once a defendant obtained an unreversed appellate ruling that the Government had failed to introduce sufficient evidence to convict him at trial, a second trial was barred by the Double Jeopardy Clause." 468 U.S. at 323. The Court made clear that *Burks* did not "[lay] down some overriding principle of double jeopardy law that was applicable across the board in situations totally different from the facts out of which it arose." *Ibid.* The Court held that the Double Jeopardy Clause did not entitle the defendant

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trying the defendant for the murder of B should not turn on whether, at the trial for the murder of A, there happened to be evidence that the defendant murdered B as well.

in *Richardson* to a determination on the issue of evidentiary sufficiency, because the Clause "by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* at 325.

As the court of appeals recognized, Pet. App. 8a-12a, the reasoning of *Richardson* is controlling here. A reversal on appeal based on a defect in the indictment and jury instructions is no more the equivalent of an acquittal than is a mistrial based upon a hung jury. In terms of the language of the Double Jeopardy Clause and the interests it serves, it is hard to imagine why defendants, having no right to a determination of the sufficiency of the evidence when a jury deadlocks, should be entitled to such a determination following a conviction that is reversed because of an error in the charging instrument. Surely, the defendant has no greater interest in a determination of the sufficiency of the evidence against him in that situation than in the situation at issue in *Richardson*. Likewise, the public's interest in an error-free determination of the defendant's guilt is in no way diminished. See *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). There simply has been no "event" equivalent to an acquittal that might be said to terminate the defendant's "jeopardy." In short, the court of appeals' decision correctly follows from *Richardson*.

The decision below is not in conflict on this issue with the decision of any other court of appeals. The petition does not cite any case—and we are aware of none—in which a court of appeals reversed a conviction because the indictment failed to charge an offense, but the court nevertheless reviewed the sufficiency of the evidence. Indeed, the Sixth Circuit rejected a claim identical to petitioners' in a case involving pre-

cisely the same procedural setting as in this case, and this Court denied certiorari. *United States* v. *Davis*, *supra*. There, as in this case, the defendant was indicted and convicted on mail fraud charges under an intangible rights theory. After *McNally* was decided, the Sixth Circuit reversed his conviction. The government then brought a second mail fraud indictment premised on the "money or property rights" theory, and Davis moved to dismiss the second indictment. On his interlocutory appeal from the denial of that ruling, the defendant argued, like petitioners, that the court of appeals should determine whether the evidence at his first trial was sufficient to prove the new charges. The Sixth Circuit declined to do so for the same reasons that we have advanced here. 873 F.2d at 907-908. Accord *United States* v. *Porter*, 807 F.2d 21, 23-24 (1st Cir. 1986).[4]

2. Petitioners also argue (Pet. 11-14) that the government should be precluded from retrying them on a different mail fraud theory than was originally charged, because the government had the option of

[4] Petitioners cite several cases that suggest or require that an appellate court should pass on the sufficiency of the evidence when it finds reversible error other than that the indictment failed to charge an offense. See, *e.g.*, *United States* v. *Szado*, 912 F.2d 390, 39 (9th Cir. 1990) (right to jury trial before magistrate); *United States* v. *Quinn*, 901 F.2d 522, 529 n.5 (6th Cir. 1990) (erroneous admission of evidence); *United States* v. *Douglas*, 874 F.2d 1145, 1149-1151 (7th Cir.) (erroneous jury instructions), cert. denied, 493 U.S. 841 (1989); *Vogel v. Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986) (erroneous placement of burden of proof on insanity). None of those cases suggests, however, that the propriety of retrying a defendant whose conviction was reversed on account of a failure to charge an offense should depend on whether the evidence was sufficient to establish a theory that was not charged.

bringing charges under the "money or property" theory at the time of the original charges but failed to do so. This claim is contrary to well-settled law.

In *United States* v. *Ball*, 163 U.S. 662 (1896), this Court held that the Double Jeopardy Clause did not bar a defendant's retrial on a charge of murder after his conviction had been reversed because of a defect in the indictment. Similarly, in *Montana* v. *Hall*, 481 U.S. 400 (1987), the Court concluded that a defendant could be reprosecuted after his first conviction had been reversed because the indictment was based on a statute that did not apply to his actions at the relevant time. These cases exemplify a "venerable principle[]" of double jeopardy jurisprudence: "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict * * * poses no bar to further prosecution on the same charge." *United States* v. *Scott*, 437 U.S. 82, 90-91 (1978); accord, *e.g.*, *Burks* v. *United States*, 437 U.S. 1, 13-14 (1978).

That principle governs this case. Petitioners' prior convictions were reversed because of a deficiency in the original indictment, but because of insufficiency of the evidence. Consequently, petitioners may be retried. As this Court held in *Montana* v. *Hall*, 481 U.S. at 404, "[i]t is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument."

Petitioners nevertheless argue that because the government could have brought the original indictment under the deprivation of property rights theory, the government's "tactical choice" to charge under the intangible rights theory should preclude petitioners' trial on the new indictment. Acceptance of that position would effectively repudiate the rule of *Ball* and

Montana v. *Hall*, *supra*. Although the theory on which the first indictment was based turned out to be legally flawed and not to support a conviction, the same was true in *Ball* and *Montana* v. *Hall*. In each of those cases, moreover, the prosecutor went to trial on an invalid charge, yet the prosecutor's error in those cases did not result in a double jeopardy bar to a second prosecution. Indeed, the prosecutor's error in this case was understandable, because at the time of the first indictment, the courts of appeals were unanimous in upholding the "intangible rights" theory of mail fraud. See *United States* v. *Davis*, 873 F.2d at 905. This court's subsequent decision in *McNally* does not call into question the reasonableness of the government's charging decision in the original indictment in this case.

Consequently, this case is unlike the decisions on which petitioners rely and does not conflict with the decision of any other court of appeals.[5] Nor does

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[5] For example, in *United States* v. *Cavanaugh*, 948 F.2d 405 (8th Cir. 1991), the defendants were charged with both assault to inflict serious bodily injury and murder. The charged incident could have been viewed as either a separate assault and murder, or as a continuous crime culminating in murder. At trial, the prosecutor argued that the murder was the culmination of the assault, and, at the government's request, the trial judge instructed the jury that it should return a verdict on either the murder or the assault charge, but not both. As a result, the jury returned guilty verdicts on the murder charges but no verdicts on the assault charges. When the murder convictions were reversed for insufficient evidence, the prosecutor argued before the trial court that the assault charges were lesser included offenses of the murder charges and that the jury must have found the defendants guilty of the assault. On appeal from the district court's entry of judgments of conviction on the assault charge, the government conceded that the assault was not a lesser included

Grady v. *Corbin*, 495 U.S. 508 (1990), support their argument. *Grady* involved successive prosecutions, first for traffic violations and then for homicide and assault charges arising out of the traffic violations.

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offense of the murder charge, but the government argued that the assault convictions could stand as separate offenses. The court of appeals held that the assault charges were barred because the government had abandoned the separate assault theory at trial and had deliberately prevented the jury from deciding the assault counts. 948 F.2d at 410-417. Here, by contrast, the first indictment did not charge both the intangible rights theory and the deprivation of property theory of mail fraud, and the government did not "abandon" the deprivation of property theory or deprive the jury of an opportunity to return a verdict on a charged count. Conseqently, *Cavanaugh* is inapposite.

Saylor v. *Cornelius*, 845 F.2d 1401 (6th Cir. 1988), is similar to *Cavanaugh*. The defendant was charged with one count of murder that encompassed theories of culpability as an accomplice and as a conspirator. Inexplicably, the prosecutor acquiesced in a jury charge only on the theory of conspiracy, even though there was evidence supporting the accomplice theory. After the defendant's conviction was reversed in state court for lack of evidence, the court of appeals barred further trial on the accomplice theory. But in *United States* v. *Davis*, *supra*, the Sixth Circuit specifically held that its prior decision in *Saylor* was inapplicable in the precise circumstances present here, because only one mail fraud theory—intangible rights—was charged; the deprivation of property theory simply was not at issue at the first trial. 873 F.2d at 906.

Petitioners also rely on two district court decisions that refused to give the government a second chance to prove mail fraud violations after the defendants' indictments were reversed because they were brought under the intangible rights theory. See *United States* v. *Slay*, 717 F. Supp. 689 (E.D. Mo. 1989); *United States* v. *Gray*, 705 F. Supp. 1224 (E.D. Ky. 1988). For the reasons we have stated in the text, we believe those decisions are wrong, and in any event, they do not represent conflicting decisions at the appellate level.

In this case, petitioners have not "already been prosecuted" on mail fraud charges within the meaning of *Grady*, because their prior convictions have been reversed and are a nullity. Therefore, under conventional double jeopardy principles, petitioners' prior convictions do not bar their retrial on the new indictment.

In short, nothing in this Court's cases or double jeopardy principles suggests that the permissibility of a retrial should turn on whether an indictment can be characterized as the product of a deliberate decision not to charge an available theory of criminal liability. Petitioners successfully argued on appeal that their first indictment was invalid. In so doing, they waived their right to have their case concluded in a single trial and may therefore be subject to a second trial, this time under a proper theory of prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45466

Supreme Court, U.S.
FILED
JUN 16 1992
OFFICE OF THE CLERK

(3)

No. 91-1617

IN THE

United States Supreme Court

October Term, 1991

WILLIAM C. HULS AND
MARSDEN W. MILLER, JR.,
Petitioners

VERSUS

UNITED STATES OF AMERICA,
Respondent

**On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit**

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June 16, 1992

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No. 91-1617

IN THE

United States Supreme Court

October Term, 1991

WILLIAM C. HULS AND
MARSDEN W. MILLER, JR.,
Petitioners

VERSUS

UNITED STATES OF AMERICA,
Respondent

ARGUMENT

The government argues, as it did below, that this is merely a routine "defective indictment" case, and that petitioners' double jeopardy claims therefore fail under an "unbroken line of precedent" permitting retrial where a conviction is reversed for procedural error. The Fifth Circuit rejected the government's analysis, admitted that the defendants' position was supported by well established appellate authority, but ultimately ruled against petitioners solely because it felt compelled to do so by the holding in *Richardson v. United States*, 468 U.S. 317 (1984). The government's opposition misstates the relevant law, and we file this reply brief to set the record straight.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE FOUR-WAY CIRCUIT SPLIT ON WHETHER, EVEN IF THE EVIDENCE WAS INSUFFICIENT AT HIS INITIAL TRIAL, A DEFENDANT FOREVER LOSES HIS RIGHT TO DOUBLE JEOPARDY PROTECTION IF HIS CONVICTION IS REVERSED ON OTHER GROUNDS

The government misstates the first issue by framing the question as whether petitioners are entitled to a review of the "suffi-

ciency of the evidence at their first trial under the theory charged in petitioners' second indictment." Petitioners are now charged for the exact same conduct with the exact same crime — mail fraud — as they were at the first trial. What petitioners seek is a review of the sufficiency of the evidence at trial to support a conviction for mail fraud — on *any* valid mail fraud "theory."

A prosecutorial "theory" is nothing more than a plan or method for proving a set of facts believed by the prosecution to constitute a criminal offense.[1] Here, the prosecutors "theorized" that they could prove mail fraud without putting on any evidence of a property deprivation. They were wrong. Thus, at petitioners' trial the government proved a set of facts that did not constitute mail fraud or any other crime. For its own reasons and by its own choice, the government totally failed to put in any evidence of an essential element (money or property deprivation) of the charged crime (mail fraud), and under these circumstances the double jeopardy clause bars a second mail fraud trial. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (defendant is entitled to an acquittal unless government proves *every* element of the offense beyond a reasonable doubt).

The hypothetical posed by the government (Opp. Mem. at 4, n. 3), has no resemblance whatsoever to this case, because there the second trial would be for completely different conduct, the murder of B, a different individual. Here, the government is seeking to retry petitioners under the exact same criminal statute for the exact same conduct. Thus, a much more analogous example would be an effort to retry the defendant for the murder of A. Suppose, for example, that the initial conviction was reversed on the grounds that A was not an "official" federal agent at the time of the murder. Could the government then reindict the defendant for the same murder of A, based on some new theory, unsupported by any evidence at the first trial, that A was an "unofficial"

[1]The prosecution is not even required to *disclose* its theories prior to trial, let alone plead its theories in the indictment. *See, e.g., United States v. Gabriel*, 715 F.2d 1447, 1449 (10th Cir. 1983); *United States v. Lawson*, 688 F. Supp. 314, 315 (S.D. Ohio 1987).

federal agent? Surely the double jeopardy clause would prohibit this.[2]

The government attempts to distinguish all of the conflicting cases cited by petitioners (and by the Fifth Circuit) on the sole basis that none of these cases reviewed the sufficiency of the evidence after reversing a conviction because the indictment "failed to charge an offense." However, there are plenty of cases that have done so. For example, in *United States v. Fitapelli*, 786 F.2d 1461 (11th Cir. 1986), the Eleventh Circuit first reversed the defendants' convictions because the indictment did not sufficiently charge the "flow theory" of Sherman Act jurisdiction. 786 F.2d at 1463. Then, for double jeopardy purposes, the court reviewed the evidence and held there was "insufficient evidence of jurisdiction under the (uncharged) flow theory," *id.* at 1464, which is the exact same type of inquiry the government now contends would be "pointless." *Accord, United States v. Holcomb*, 797 F.2d 1320 (5th Cir. 1986) (evidentiary sufficiency reviewed after reversal of Mann Act convictions for failure of indictment to allege all of the essential elements of the crime).

Furthermore, this Court in *Montana v. Hall*, 481 U.S. 400 (1987), a case relied on by the government in its opposition, expressly noted the evidentiary sufficiency requirement in cases where the government seeks retrial after a conviction is reversed due to a defective indictment. In *Hall*, the indictment was invalid because it pleaded the wrong statute. The Court held that retrial was permissible because there was "no suggestion that the evidence introduced at trial was insufficient to convict respondent."

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[2]A rule permitting the government to evade the double jeopardy clause simply by recasting its "theory" of the crime would encourage prosecutorial abuse. The prosecution would virtually be *encouraged* to experiment and indict only on the most expansive legal theories, on which it is the easiest to obtain a conviction, because the defendants could always be reindicted and retried on a more conservative and limited theory if the expansive theory proves to be legally invalid. And there would be *no limitation* on the number of times the government could narrow or recast its theory so as to subject the defendants to multiple trials.

481 U.S. at 403. Had the evidence been insufficient, retrial clearly would have been barred by double jeopardy.[3]

For all of these reasons, the Fifth Circuit did not accept the government's contention that evidentiary review should not be granted because the first indictment was defective and the second one is based on a different "theory."[4] The Fifth Circuit relied exclusively on the proposition that *Richardson* precludes an evidentiary review, and the correctness of this conclusion is the issue now before this Court.

Since the filing of our petition for certiorari, another federal circuit court has rejected the Fifth Circuit's view that *Richardson* prohibits a review of evidentiary sufficiency after a reversal of a conviction on other grounds. Reaffirming its "longstanding rule," the Ninth Circuit held:

> Under *Richardson*, it appears that appellate courts are not *required* to consider sufficiency issues. . . . [But] we find nothing in *Richardson* which *prevents* appellate courts from assessing the sufficiency of the evidence if they so wish.

United States v. Bishop, 959 F.2d 820, 829 n. 11 (9th Cir. 1992).

It is apparent that the various circuit courts have developed radically different interpretations of *Richardson*, and that action by this Court is needed to ensure a fair and uniform procedure that will preserve defendants' double jeopardy rights without unduly burdening the government. This case is an appropriate opportunity for this Court to resolve the conflict.

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[3]*United States v. Kozminski*, 821 F.2d 1186 (6th Cir. 1987), *aff'd*, 487 U.S. 931 (1988), is also instructive. There, this Court held that the theory charged was invalid. However, because and only because the Court found the evidence to be sufficient under a valid theory, retrial was permitted. 487 U.S. at 953. *See* 821 F.2d at 1193. The defendants in this case deserve at least that same consideration, especially where the government does not even argue that the crime of mail fraud was proven.

[4]The government's argument on this point is based entirely on *United States v. Davis*, 873 F.2d 900 (6th Cir.), *cert. denied*, 493 U.S. 923 (1989) (with White and Blackmun, JJ., dissenting from denial of certiorari). The Fifth Circuit opinion at issue here does not even mention *Davis*.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT ON WHETHER A DEFENDANT MAY BE RETRIED ON A THEORY OF CRIMINAL LIABILITY THAT THE PROSECUTION ABANDONED FOR STRATEGIC REASONS AT THE FIRST TRIAL

In response to our argument that the prosecution's abandonment of the "money or property" theory at the initial trial bars a new trial on that theory, the government asserts that this claim is contrary to *United States v. Ball*, 163 U.S. 662 (1896), and *Montana v. Hall*, 481 U.S. 400 (1987). But *Ball* and *Hall* are not at all like petitioners' case. There was no suggestion in either of those cases that the government failed to prove a crime under *any* valid theory. In *Ball*, the indictment was defective simply because it neglected to specifically allege the time and place of a murder. *Hall* was a situation where the indictment cited the wrong statute.

The present case does not involve the formal or clerical errors at issue in *Hall* and *Ball*. Here, it is undisputed that the first indictment was worded as it was purely as the result of a volitional, strategic decision by the prosecution. Instead of using "adequate preparation and foresight" to avoid subjecting the defendants to more than one trial, *Grady v. Corbin*, 110 S. Ct. 2084, 2095 (1990), the prosecution opted to put all of its eggs in the "good government" basket. These prosecutors could have at least presented the jury with a "money or property" theory in the alternative, but for tactical reasons they decided to abandon the property theory and to rely exclusively on the invalid "good government" theory.

Thus, there is no meaningful distinction between the prosecutorial choice at issue here and the conduct that resulted in a double jeopardy bar to retrial in *United States v. Cavanaugh*, 948 F.2d 405 (8th Cir. 1991) (no retrial on abandoned "separate assault" theory). And of course, as both the government and the Fifth Circuit concede, this case is identical to *United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1989), and *United States v. Gray*, 705 F. Supp. 1224 (E.D. Ky. 1988), where the government was denied a second chance to prove mail fraud after *McNally*-based reversals of the initial convictions.

There clearly is division and confusion in the courts on the question whether, and when, a tactical decision by the government that prejudices the defendant constitutes an "abandonment" for double jeopardy purposes.[5] This is an important and recurring issue that warrants review by this Court, and nothing in the government's opposition suggests otherwise.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 16, 1992

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[5]The government's contention that petitioners "waived" their double jeopardy rights by successfully arguing that their first indictment was invalid is totally foreclosed by *Burks v. United States*, 437 U.S. 1, 17 (1978) (defendant does *not* waive his right to judgment of acquittal based on double jeopardy by "seeking a new trial as one of his remedies"), and *Green v. United States*, 355 U.S. 184, 191-92 (1957) (it would be "wholly fictional" to say that defendant waives his double jeopardy defense by successfully appealing conviction on lesser charge).